

The sheets entitled “Producer Net Commission Payment Calculation” were not consistently supplied to Plaintiff prior to May 2018. (Tr. 130: 6-14).

The total amount withheld from Plaintiff by Sales Associates was \$100,000. (Tr. 50: 8-11; Ex. 32, 34, 35, 36).

APPLICABLE LAW

I. Defendant drafted the employment agreement in question, so any ambiguity in that contract must be construed against Defendant.

If the Court finds that the Agreement is ambiguous, then the Court must construe the Agreement against Defendant. It is well established in Virginia that “[i]n the event of an ambiguity in the written contract, such ambiguity must be construed against the drafter of the agreement.” *Doctors Co. v. Women's Healthcare Assocs.*, 285 Va. 566, 573 (Va. 2013) (quoting *Cappo Mgmt. v. Inc. v. Britt*, 282 Va. 33, 37 (Va. 2011)); see also *Martin & Martin, Inc. v. Bradley Enters., Inc.*, 256 Va. 288, 291 (Va. 1998); *Mahoney v. NationsBank of Va.*, 249 Va. 216, 222 (Va. 1995); *Winn v. Aleda Constr. Co.*, 227 Va. 304, 307 (Va. 1984). Here, Sales Associates admits that Plaintiff did not assist in the drafting of the Agreement, so if this Court finds the language of the Agreement to be ambiguous, this Court must construe any ambiguity against Sales Associates.

“Contractual provisions are ambiguous if they may be understood in more than one way or if they may be construed to refer to two or more things at the same time.” *Nextel WIP Lease Corp. v. Saunders*, 276 Va. 509, 516 (Va. 2008). “The ambiguity . . . must appear on the face of the instrument itself.” *Id.* (citing *Salzi v. Virginia Farm Bureau Mut. Ins. Co.*, 263 Va. 52, 55 (Va. 2002)). “In determining whether the provisions are ambiguous, [courts] give the words employed their usual, ordinary, and popular meaning.” *Id.* (citing *Pocahontas Mining, L.L.C. v. Jewell Ridge Coal Corp.*, 263 Va. 169, 173 (Va. 2002)). But “contractual provisions are not ambiguous merely

because the parties disagree about their meaning.” *Id.* (citing *Dominion Savings Bank, FSB v. Costello*, 257 Va. 413, 416 (Va. 1999)).

Defendant’s and Plaintiff’s understanding of “commission payment procedures” in Addendum (III-12.2) are significantly different. Defendant urges that it includes a deduction, but Plaintiff contends that the understanding up until five months after his employment ended was that “commission payment procedures” would not include a deduction after he retired.

Mr. Bob testified that an email was sent to all producers detailing the amount of the service specialist deduction that would be taken in 2017. (Tr. 108: 11-17; Ex. 4.) He admitted that no such email was sent to Plaintiff in January 2018 detailing what deduction would be taken post-retirement. (Tr. 108: 11-25.) Sales Associates did not take any deductions from Plaintiff’s post-retirement payments for January through May of 2018. (Tr. 42: 18-25.)

Neither the Agreement nor Addendum includes a definition of the term “commission payment procedures.” Defendant has not provided any evidence that a definition of the term “commission payment procedure” has ever been provided to Plaintiff. Sales Associates knew how to include term definitions in the documents it drafted. Page 7 of the Employment Agreement (Exhibit 1), Section 11 is entitled “Defined Terms.” That section includes definitions for “Competition,” “Prospective Clients,” and “Cause,” and nothing else. (Ex. 1.)

If a term is not specifically defined, then, pursuant to Virginia contract law, “[w]ords that the parties used are normally given their, usual, ordinary, and popular meaning.” *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 392 (Va. 2012). “Even though an agreement may have been drawn unartfully, the court must construe the language as written if its parts can be read together without conflict.” *Doswell Ltd. P’ship v. Virginia Elec. & Power Co.*, 251 Va. 215, 222-23 (Va. 1996).

The term “commission payment procedure,” given its usual, ordinary, and popular meaning, refers to the calculation of the commission: when, how often, and in what form that commission is to be paid. The Agreement Sections 2.6, 2.7, 2.8, 2.9, 3.6, 12.2, and Addendums in Exhibits 43, 44, and 45 are the only parts of the Agreement or Addendum describe such a “commission payment procedure.” In each of those provisions, the language “pay a commission” or “repay a commission” can be found.

On the other hand, Section 2.2 of the Agreement speaks not of how the Employee will be paid, but rather how the “Sales Assistant” will be paid. This section details a company responsibility with a cost-sharing provision. Subsection 2 of the Agreement is titled “Company’s Responsibilities.” The language in Subsection 2.2, “such amount will be deducted on an annual pro-rata basis from the employee’s commission due on the 15th of each month *for as long as the Employee is Employed by the Company*” (emphasis added) indicates that the cost-sharing is deducted from the commission after it is calculated and paid. It is not a part of that calculation.

The service specialist deduction, which is calculated by Human Resources, is taken after the commission payment amount has been determined, making it an administrative expense rather than a commission payment. Ms. Doe confirmed this administrative expense classification in her testimony when she stated, “for purposes of determining what that 49 percent was, and then adding on the applicable employer taxes, I made that initial calculation and provided it to our accounting manager for application on a monthly basis to the commission payments.” (Tr. 118: 18-24.) The distinction between the two separate procedures indicates that the deduction for administrative expense procedure is separate from the “commission payment procedure.” Defendant attempts to conflate these two procedures, thereby creating an ambiguity.

- a. **It is a cardinal rule that a contract should not be read to render any provision superfluous, as Defendant would wish for this Court to do.**

Defendant urges this Court to construe the language in Section 2.2 of the Agreement, which states that, “such amount will be deducted on an annual pro-rata basis from the Employee’s commission,” to be read as part of the “commission payment procedure.” But in doing so, Defendant ignores the second half of the sentence it provided, which reads in its entirety that, “such amount will be deducted on an annual pro-rata basis from the Employee’s commission due on the 15th of each month *for as long as the Employee is employed by the Company*” (emphasis added). The portion of the sentence that Defendant omits specifically limits the deductions to occur only during the course of Plaintiff’s employment at Sales Associates.

When interpreting the meaning of a contract, “[e]ffect should be given to every part of the instrument, if possible, and no part thereof should be discarded as superfluous or meaningless.” *CNX Gas Co. LLC v. Rasnake*, 287 Va. 163, 168 (Va. 2014) (citing *Foster v. Foster*, 153 Va. 636, 645 (Va. 1930)).

In determining the interpretation of Section 2.2 under the superfluous canon, the Court should look to the entire agreement to find meaning. The contract between the parties was intended to govern the employer-employee relationship, with Section 2, specifically governing that relationship only before it was terminated.

Section 2 of the Agreement is titled “Company’s Responsibilities,” and goes on to list duties that Sales Associates owes to its employee while the employee is employed at Sales Associates. Section 3 of the Agreement is titled “The Employee’s Responsibilities,” and likewise lists duties that the employee owes to Sales Associates *while employed at Sales Associates*. On the other hand, Sections 5 and 6 provide terms of the relationship *after* employment ends. Language such as “upon separation or termination of employment with the Company, for a

period of two years thereafter,” and “[f]or four years following the Employee’s separation from the Company,” makes this clear. No such language is included in Section 2 of the Agreement, and the duties listed in Section 2 are those that would typically exist only during the course of employment. Thus, Section 2.2 is specifically limited to the period in which Plaintiff was employed by Defendant.

Any interpretation of Section 2.2 of the Agreement that excludes the phrase, “as long as the Employee is employed by the Company” renders that phrase superfluous and meaningless. The sentence—including the limitation on duration of payments—must be read in its entirety and in conjunction with the entire agreement to ascertain its meaning per the cardinal rule that a contract should not be read in a way that renders any provision superfluous. This Court should therefore find that the Service Specialist Deduction of Section 2.2 was conditioned on Plaintiff’s employment with the Company.

b. The acts of Defendant during the five months where no deduction was taken established the proper interpretation of the Agreement.

The language of the Agreement further is evidenced to be ambiguous by Defendant’s own actions. When Plaintiff approached Sales Associates to clarify which, if any, deductions would be taken from his post-retirement payments, Sales Associates’ Head of Human Resources, Jane Doe, confirmed in writing that “none” would be taken. When Plaintiff later retired, for the first five months of his retirement, until May of 2018, there were no deductions taken from his post-retirement payments. It is highly suspect for Defendant to argue that the language of the documents it drafted is clear and unambiguous when it interpreted the Agreement the same as Plaintiff for five months before changing course. Defendant cannot simultaneously argue that contract language is clear, while its actions show that it was confused by the provisions in the Agreement and Addendum.

The “practical construction of a contract by the parties themselves is entitled to great weight in determining its proper interpretation.” *Robinson-Huntley v. George Wash. Carver Mut. Homes Ass'n*, 287 Va. 425, 431 (Va. 2014) (quoting *Coal Operators Cas. Co. v. C. L. Smith & Son Coal Co.*, 192 Va. 619, 626 (Va. 1951)). “The acts of the parties in relation to a contract, establish a practical construction of it.” *Id.* But, in order for the acts to establish the practical construction of the contract, “the acts must have been done in pursuance of and by reason of the contract.” *Roanoke R. & E. Co. v. Virginian R. Co.*, 159 Va. 289, 293 (Va. 1932).

By not deducting from Plaintiff’s post-retirement payouts for the first five months of Plaintiff’s retirement, Defendant manifested that it did not believe that the Addendum changed the language of the Agreement to allow a Service Specialist Deduction to be subtracted from Plaintiff’s post-retirement payments. If Sales Associates could not consistently interpret the Agreement and Addendum that it drafted, there is no doubt that an ambiguity exists. Furthermore, because during those five months Sales Associates *was* issuing post-retirement payments, it was otherwise acting “in pursuance of and by reason of the contract.” *Roanoke R. & E. Co.*, 159 Va. at 293.

Plaintiff’s interpretation is the only interpretation that gives effect to all language and phrases of the Agreement and the Addendum without conflict. Furthermore, because any ambiguity must be construed against the drafter, this Court should adopt Plaintiff’s interpretation of the Agreement and hold that “commission payment procedures” does not include withholding the Service Specialist Deduction from Plaintiff’s post-retirement payments.

CONCLUSION

Defendant has unjustly denied Plaintiff a portion of his post-retirement payments in the amount of \$100,000. There is an ambiguity in the Agreement between the parties that this Court

should resolve against the drafter of the Agreement, Defendant. Defendant has inconsistently interpreted the Agreement: Defendant notified Plaintiff in writing that no deductions would be taken from Plaintiff's post-retirement payments, and for the first five months of Plaintiff's retirement no deductions were applied. Defendant then changed its' course, to the detriment of Plaintiff, by modifying the previously agreed upon interpretation of the Agreement. Thus, the Agreement should be given the interpretation that Plaintiff puts forth.

WHEREFORE, for the foregoing reasons, Plaintiff respectfully requests that the Court enter judgment in its favor and grant any other further relief that the Court may deem just and proper.

JOHN SMITH

By

Counsel for Plaintiff

Applicant Details

First Name **Elizabeth**
 Middle Initial **L**
 Last Name **Larson**
 Citizenship Status **U. S. Citizen**
 Email Address e.larson@wustl.edu
 Address

Address**Street****8500 Maryland Avenue****City****St. Louis****State/Territory****Missouri****Zip****63124****Country****United States**

Contact Phone Number **8172230509**
 Other Phone Number **8172230509**

Applicant Education

BA/BS From **Baylor University**
 Date of BA/BS **May 2019**
 JD/LLB From **Washington University School of Law**
http://www.nalplawschoolonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014
 Date of JD/LLB **May 14, 2022**
 Class Rank **I am not ranked**
 Does the law school have a Law Review/Journal? **Yes**
 Law Review/Journal **No**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Shields, Ann
ashields@wustl.edu
Hollander-Blumoff, Rebecca
rhollander@wustl.edu
314-935-6043
Ron, Levin
rlevin@wustl.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Elizabeth Larson
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St. Louis, MO 63130
817-223-0509
e.larson@wustl.edu

April 10, 2021

The Honorable Elizabeth Hanes
United States District Court for the Eastern District of Virginia
701 E. Broad Street
Richmond, Virginia 23219

Dear Judge Hanes:

I am writing to apply for a clerkship in your chambers, either beginning in 2022 or for your next available position. I am currently a second year law student at the Washington University School of Law, but intend to practice criminal law in Virginia following many summers spent in McLean. This fall I spent the semester as an extern with the U.S. Attorney's Office for the Northern District of Texas assisting the criminal and appellate division. This experience has offered familiarity with the district's commitment to timely disposition of cases. I am currently serving as a judicial extern to the Hon. Judge Eskridge of the United States District Court for the Southern District of Texas gaining further insight into civil proceedings. This summer I will return to the D.C. area as a Department of Justice intern within the Civil Division's Office of Foreign Litigation where I will draft pleadings and motions for defensive litigation.

Enclosed please find my résumé, transcript, and writing sample. The writing sample is an order I completed during my judicial internship in Judge Eskridge's chambers. The following individuals are submitting letters of recommendation separately and welcome inquiries in the meantime. Judge Sudderth of the Second Court of Appeals has also agreed to serve as a reference.

Professor Shields
Washington University
School of Law
ashields@wustl.edu
(314) 935-7373

Professor Levin
Washington University
School of Law
rlevin@wustl.edu
(314) 935-6490

Professor Hollander-Blumoff
Washington University
School of Law
rhollander@wustl.edu
(314) 935-6403

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely,
Elizabeth Larson

ELIZABETH LARSON

8500 Maryland Avenue #707 St. Louis, Missouri 63124
(817) 223-0509 | e.larson@wustl.edu

EDUCATION

Washington University School of Law

St. Louis, MO

J.D. Candidate | GPA: 3.36

May 2022

Honors and Activities:

- Excellence in Oral Advocacy Award
- Bar Association of the District of Columbia Member
- Public Service Advisory Board- Executive Board Member- Public Service Committee Chair
- Membership: China Law Society, Technology & Privacy Society, International Law Society, Christian Legal Society
- Scholars in Law Award (50% tuition merit-based scholarship)

Baylor University, Honors College

Waco, TX

B.A. in University Scholars (International Studies, History, & Political Science interdisciplinary program)

May 2019

GPA: 3.95 | *summa cum laude*

Honors and Activities:

- Dean's List (all semesters); Honors Thesis: "The Revolutionary Rhetoric and Leninist Results of Bolshevik Feminism, 1917-1921"; Student Body, Internal Vice President (Junior and Senior Year); Student Senate, President (Junior and Senior Year); Baylor Challenge Coin Recipient (for work on behalf of veterans)

EXPERIENCE

U.S. Department of Justice

Washington, D.C.

Office of Foreign Litigation

Summer 2021

- Will conduct contemporary international law research and writing
- Will draft pleadings and motions for defensive litigation

Judicial Intern to the Hon. Charles Eskridge at U.S. District Courts

Houston, TX

Spring 2021

- Assisted orders and opinions drafting
- Outlined opposed motions
- Observed robust motion practice and various civil hearings

U.S. Attorney's Office

Ft. Worth, TX

Northern District of Texas, Criminal and Appellate Divisions

Fall 2020

- Drafted pleadings, motions, and briefs
- Assisted with witness preparation, hearings, and trials

U.S. Department of Justice

Ft. Worth, TX

Legal Intern (cancelled due to COVID-19)

Summer 2020

Texas Court of Appeals

Ft. Worth, TX

Legal Intern to Second Court of Appeals Chief Justice Bonnie Sudderth

Summer 2020

- Assisted in opinion drafting
- Conducted oral presentations of attorneys' legal arguments
- Analyzed briefs and reviewed motions

Central Intelligence Agency (CIA)

Washington, D.C.

Graduate Student Fellow - Analyst

Summer 2019

- Acquired Top-Secret Clearance
- Wrote Presidential Daily Briefs for President Donald J. Trump and cabinet members regarding domestic and stability issues
- Analyzed East Asian legal issues which was shared among the intelligence community and policymakers

Political and Economic Intern

Summer 2018

- Wrote critical pieces of leadership analysis pertaining to national security for top U.S. policy makers and intelligence community; Produced materials read among the domestic and international intelligence community

Exploitation Officer Intern

Summer 2017

- Utilized Mandarin proficiency and critical thinking skills and invited to return in more substantial role

SKILLS & INTERESTS | Top-Secret clearance | Mandarin (competent) | Russian (basic) | Fishing (a/k/a waiting) | Ping-Pong



Washington University in St. Louis

Office of the University Registrar

Page 1 of 1

Record Of: **Larson, Elizabeth**

Current Programs Of Study:

Student ID Number: 480126

JURIS DOCTORIS

Transcript Issued 06/15/2021 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2019

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (SHIELDS)	LAW	W74 500K	2.0	B
CONTRACTS (DEGEEST)	LAW	W74 501D	4.0	B
TORTS (NORWOOD)	LAW	W74 515F	4.0	B-
CONSTITUTIONAL LAW I (OSGOOD)	LAW	W74 520C	4.0	B+

Enrolled Units 14.0 Semester GPA 3.27 Cumulative Units 14.0 Cumulative GPA 3.27

Spring Semester 2020

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	P
LEGAL PRACTICE II: ADVOCACY (SHIELDS)	LAW	W74 500L	2.0	CR
CRIMINAL LAW (GARDNER)	LAW	W74 502T	4.0	CR
NEGOTIATION (SHIELDS)	LAW	W74 503E	1.0	CR
CIVIL PROCEDURE (LEVIN)	LAW	W74 506	4.0	CR
PROPERTY (SACHS)	LAW	W74 507W	4.0	CR

Enrolled Units 16.0 Semester GPA 0 Cumulative Units 30.0 Cumulative GPA 3.27

Fall Semester 2020

LEGAL PROFESSION (KUEHN)	LAW	W74 563V	3.0	B+
FEDERAL COURTS (HOLLANDER-BLUMOFF)	LAW	W74 634G	4.0	A-
SEMESTER IN PRACTICE EXTERNSHIP (PERRY)	LAW	W74 668D	8.0	CR

Enrolled Units 15.0 Semester GPA 3.53 Cumulative Units 45.0 Cumulative GPA 3.36

Spring Semester 2021

CONTEMPORARY ISSUES IN NATIONAL SECURITY LAW (BERMAN)	LAW	W74 522B	1.0	B+
SEMESTER IN PRACTICE EXTERNSHIP	LAW	W74 668H	12.0	CR

Enrolled Units 13.0 Semester GPA 3.46 Cumulative Units 58.0 Cumulative GPA 3.36

Remarks

SP2020 SPECIAL NOTE: DURING THE SPRING OF 2020, A GLOBAL PANDEMIC REQUIRED SIGNIFICANT CHANGES TO COURSEWORK. UNUSUAL ENROLLMENT PATTERNS AND GRADES MAY REFLECT THE TUMULT OF THE TIME.

***** END OF TRANSCRIPT *****

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Academic Transcript

[Financial Aid Eligibility Menu](#)

This is not an official transcript. Courses which are in progress may also be included on this transcript.

[Transfer Credit](#) [Institution Credit](#) [Transcript Totals](#)

Transcript Data

STUDENT INFORMATION

Birth Date: July 6, 1997

Curriculum Information

Current Program

Degree: Bachelor of Arts

College: College of Arts and Sciences

Major and Department: University Scholar, University Scholars

This is NOT an Official Transcript

DEGREE AWARDED :

Awarded: Bachelor of Arts **Degree Date:** May 18, 2019

Institutional Honors: Summa Cum Laude

Curriculum Information

Major: University Scholar

TRANSFER CREDIT ACCEPTED BY INSTITUTION [-Top-](#)

201420: CBE ADVANCED PLACEMENT EXAM

Subject	Course	Title	Grade	Credit Hours	Quality Points			R
ENG	1302	Thinking & Writing	CR	3.000				0.00
ENV	1301	Exploring Environmental Issues	CR	3.000				0.00
HIS	2365	Hist of U.S. to 1877	CR	3.000				0.00
HIS	2366	Hist of U.S. Since 1877	CR	3.000				0.00
		Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA	
Current Term:		12.000	12.000	12.000	0.000	0.00	0.00	

Unofficial Transcript

201520: CBE ADVANCED PLACEMENT EXAM

Subject	Course	Title		Grade	Credit Hours	Quality Points			R
PSC	1305	American National Government		CR	3.000	0.00			
		Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA		
Current Term:		3.000	3.000	3.000	0.000	0.00	0.00		

Unofficial Transcript

INSTITUTION CREDIT [-Top-](#)

Term: Fall 2015

College: College of Arts and Sciences

Academic Standing:

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
CHA	1088	UG	Daily Prayer/Memorial Chapel	CR	0.000	0.00	I
CHI	1401	UG	Elementary Chinese	A	4.000	16.00	
ENG	1304	UG	Thinking, Writing & Resrch	A	3.000	12.00	
FYS	1399	UG	History/20th Cent Novel HNR	A-	3.000	11.01	
HIS	1307	UG	World History since 1500	A	3.000	12.00	
LF	1181	UG	Beginning Tennis	A	1.000	4.00	
THEA	1206	UG	Theater Appreciation	A	2.000	8.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	16.000	63.01	3.93
Cumulative:	16.000	16.000	16.000	16.000	63.01	3.93

Unofficial Transcript

Term: Spring 2016

College: College of Arts and Sciences

Academic Standing:

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
CHA	1088	UG	Chapel	CR	0.000	0.00	I
CHI	1402	UG	Elementary Chinese	A	4.000	16.00	
EDC	1200	UG	Strategic Learning	A	2.000	8.00	
GTX	2301	UG	Intelct Trad Ancnt Wrld HNR	A-	3.000	11.01	
HIS	2381	UG	Intro Slavic/East Euro Studies	A	3.000	12.00	
REL	1310	UG	The Christian Scriptures	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	59.01	3.93
Cumulative:	31.000	31.000	31.000	31.000	122.02	3.93

Unofficial Transcript

Term: Fall 2016

College: College of Arts and Sciences

Academic Standing:

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
CHI	2310	UG	Intermediate Chinese	A	3.000	12.00	
GTX	2302	UG	Medieval Intellect Trad HNR	A-	3.000	11.01	
JOU	4398	UG	Public Affairs Reporting	A	3.000	12.00	
PSC	3330	UG	HNR-The American Presidency	A	3.000	12.00	
SEES	3V70	UG	Advanced Independent Study	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	59.01	3.93
Cumulative:	46.000	46.000	46.000	46.000	181.03	3.93

Unofficial Transcript

Term: Spring 2017

College: College of Arts and Sciences

Academic Standing:

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
AST	2380	UG	Peoples/Culture of Asia	A	3.000	12.00	
CHI	2320	UG	Intermediate Chinese	A	3.000	12.00	
HIS	4394	UG	Am Military Hist from 1865	A	3.000	12.00	
HON	3100	UG	Adv Readings & Research HNR	A	1.000	4.00	
HON	3200	UG	Colloquium HNR	A	2.000	8.00	
REL	1350	UG	The Christian Heritage HNR	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	60.00	4.00
Cumulative:	61.000	61.000	61.000	61.000	241.03	3.95

Unofficial Transcript

Term: Fall 2017

College: College of Arts and Sciences

Academic Standing:

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
HIS	4340	UG	Russian Revolution	A-	3.000	11.01	
HON	3101	UG	Adv Readings & Research HONORS	A	1.000	4.00	
HON	4V87	UG	Honors Thesis	CR	2.000	0.00	I
PHI	1306	UG	Logic	A	3.000	12.00	
PSC	3321	UG	Criminal Law	A	3.000	12.00	
SEES	2380	UG	Intro Slavic/East Euro I	A	3.000	12.00	
UNSC	3001	UG	Exit Interview	CR	0.000	0.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	13.000	51.01	3.92
Cumulative:	76.000	76.000	76.000	74.000	292.04	3.94

Unofficial Transcript

Term: Spring 2018

College: College of Arts and Sciences

Academic Standing:

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
GTX	4343	UG	HNR-Great Text Capstone Course	A-	3.000	11.01	
HIS	2390	UG	Women's and Gender History	A	3.000	12.00	
HON	4V87	UG	Honors Thesis	CR	1.000	0.00	I
MES	2301	UG	Intro to the Middle East HNR	A	3.000	12.00	
PSC	4344	UG	Govt & Politics of Russia	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	13.000	13.000	13.000	12.000	47.01	3.91
Cumulative:	89.000	89.000	89.000	86.000	339.05	3.94

Unofficial Transcript

Term: Fall 2018

College: College of Arts and Sciences

Academic Standing:

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
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Washington University in St. Louis

SCHOOL OF LAW

January 6, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: Recommendation for Elizabeth Larson

Dear Judge Hanes:

It is my privilege to recommend Elizabeth Larson for the position of your law clerk beginning in the fall of 2022. Not only is Elizabeth a wonderful student and tremendously hard worker, she is an absolute delight to work with and know. Elizabeth was a student in my year-long Legal Practice class during the 2019-2020 academic year. In Legal Practice, Elizabeth dedicated herself to the ongoing development of the skills and techniques for effectively conveying legal analysis.

Elizabeth demonstrated her flexibility and cheerful response to chaos when our class became virtual during the middle of our spring semester because of the pandemic. While many students had difficulty with the adjustment, Elizabeth remained resilient and strongly committed to mastering the course materials throughout the semester. The law school changed all grading in the spring semester to pass/fail because of the shift to virtual classrooms and attendant challenges for students. While this change in grading seemed to dampen many students' motivation, Elizabeth doubled down on her efforts in Legal Practice. After reviewing Elizabeth's final brief of the year for this letter, I am certain that she would have earned a top-notch grade in my class during the spring semester had grades beyond pass/fail been assigned. This was undoubtedly the result of Elizabeth's consistent efforts to develop the critical research, analytic, and writing skills crucial to her ultimate success as a lawyer. I am confident this same commitment will make her an immediate and valuable member of your chambers.

Throughout the year, I met with students in individual conferences to discuss their writing assignments. Elizabeth took full advantage of all opportunities for individual instruction to assist her in her ongoing development of her analytical skills and written communications. Rather than simply coming to these conferences and asking me to look over her assignment to see if I noticed anything she needed to work on, Elizabeth came well prepared with specific questions about challenges or concerns she encountered while drafting. I always enjoyed my discussions with Elizabeth and looked forward to our conferences.

My students give oral presentations of their research results before they begin drafting major assignments. Elizabeth's research was predictably comprehensive and her presentations were insightful and well organized. Elizabeth was effective at finding the law relevant to the legal questions posed by the assignments and did a wonderful job of highlighting the relative significance of the various legal authorities to the issues she was addressing. Accordingly, I was not surprised when our moot court judges selected Elizabeth for an Excellence in Oral Advocacy Award following our spring semester oral arguments.

Elizabeth had the opportunity to further develop her research and writing skills when she interned as a law clerk following her first year of law school and worked as a criminal law intern with the U.S. Attorney's Office last semester. Next semester, Elizabeth will again work through the law school's externship program as a law clerk in the U.S. District Court for the Southern District of Texas. Elizabeth is taking full advantage of the unusual opportunities to combine real-world experience with classroom instruction, afforded by the virtual learning environment we have continued with this academic year, to hone her legal skills and knowledge.

Elizabeth is the type of person who commits herself fully to new projects and experiences and is deeply curious about issues and problems across multiple fields and disciplines. Elizabeth was inspired to pursue law school during the three summers she spent with the Central Intelligence Agency, which also continues to inspire her to pursue a career in public service focusing on national security. As a citizen, I feel fortunate that Elizabeth is committed to this endeavor. As a professor, it is clear to me that these experiences and objectives have led to her understanding of the importance of attention to detail and integrity.

In sum, I highly recommend Elizabeth Larson for a position as your judicial clerk. I believe that Elizabeth possesses, in abundance, the academic and personal qualities that will make her a wonderful addition to your chambers. Please call me if you have any questions regarding this letter or Elizabeth's excellent qualifications.

Best,

/s/

Ann Davis Shields
Professor of Practice
Director of the Pretrial Program

Washington University School of Law

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Washington University in St. Louis

SCHOOL OF LAW

April 1, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: Recommendation for Elizabeth Larson

Dear Judge Hanes:

I am delighted to recommend Elizabeth Larson for a clerkship in your Chambers. Elizabeth is a strong student whom I had the pleasure of teaching last fall in my Federal Courts class. Elizabeth is serious, engaged, and passionate about her work, and I know she will excel as a clerk.

Teaching a large course on Zoom was a challenge that was made so much easier due to students like Elizabeth. She was always engaged, camera on, and ready with an answer to a question if cold-called. Elizabeth was also willing to volunteer to answer questions – a trait much appreciated in any classroom, but even more so in our pandemic-mandated online format. Elizabeth also asked thoughtful questions and came to office hours to follow up on questions or concerns about doctrinal complexity. Federal Courts covers exceptionally complex and difficult material, including justiciability doctrine, federal jurisdiction and the scope of Congress's control thereof, non-Article III courts, private rights of action, and government immunities. Elizabeth received an A- on the anonymously graded final exam, which reflects the very difficult curve of the large class, rather than any deficiency in her performance. Her exam was strongly written and demonstrated a good mastery of the doctrine that we covered and a terrific ability to apply the doctrine to new factual settings. Elizabeth was a committed, careful, and thoughtful student – the kind who makes teaching a pleasure.

I know Elizabeth is also very committed to public service and her interest in clerking is driven by her passion for helping make communities better. Having had the chance to speak to Elizabeth on several occasions outside of class, I know that her enthusiasm for government service and the rule of law is sincere and compelling, and the energy and drive that she brings to the study of law is refreshing. She is also a warm person with a lively sense of humor – simply put, she is a pleasure to be around. I am delighted to recommend such a deserving candidate to you.

Best,

/s/

Rebecca Hollander-Blumoff
Vice Dean for Research and Faculty Development
Professor of Law

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SCHOOL OF LAW

January 25, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: Recommendation for Elizabeth Larson

Dear Judge Hanes:

Elizabeth Larson, a student in the Washington University School of Law class of 2022, has asked me to write in support of her application to serve as a clerk in your chambers following her graduation. I am happy to recommend her for your consideration.

Elizabeth was a student in my Civil Procedure class in the spring semester of 2020. Because of the pandemic, virtually all law school course grades that semester were awarded on a credit/no credit basis. Thus, I did not assign a precise grade to her exam paper. On the basis of my reading of the exam, however, I estimate that if I had been grading in the ordinary way, she would have received a very respectable grade, around the middle of her class. (To help you put that observation into perspective, I should mention that our school currently ranks well within the top ten law schools in the country in terms of the GPA and LSAT scores of students in the entering class.) In her exam paper, which I have reread for purposes of writing this letter, Elizabeth demonstrated a very broad knowledge of the rules, cases, and principles covered in the course. In general, she was consistently able to identify the right issues raised by each question and to deploy the right authorities that should govern them.

Elizabeth is an exceptionally warm and outgoing person, and I expect that her characteristic effusiveness would make her an enjoyable coworker. More particularly, she speaks enthusiastically about her recent experiences working in the national security area. I've often heard students tell me that they hope to build a career in government work, but I seldom encounter any who can match Elizabeth for the passion she expresses when she talks about her interest in a career in public service. I believe that her interest in a judicial clerkship derives directly from her desire to pursue that goal by strengthening her legal analysis and writing skills and also participating actively in the court's work.

I hope you will give Elizabeth serious consideration. If I can answer any questions you may have, please feel free to be in touch with me.

Best,

/s/

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WRITING SAMPLE

The attached writing sample is based on an order I completed during my judicial internship for the Hon. Charles Eskridge of the United States District Court for the Southern District of Texas. The writing sample uses the Maroonbook citation guide. The question before the Court was whether default judgment was proper. I have been granted permission to use this work as a writing sample.

United States District Court
Southern District of Texas**ENTERED**

March 30, 2021

Nathan Ochsner, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

NEUTRAL GRAY	§	CIVIL ACTION NO.
MUSIC, <i>et al</i> ,	§	4:19-cv-04230
Plaintiffs,	§	
	§	
	§	
vs.	§	JUDGE CHARLES ESKRIDGE
	§	
	§	
TRI-CITY FUNDING &	§	
MANAGEMENT LLC	§	
and CLINT SMITH	§	
Defendants.	§	

**MEMORANDUM AND OPINION
GRANTING DEFAULT JUDGMENT**

Defendants Tri-City Funding & Management, LLC and Clint Smith have failed to appear or respond in this matter. The motion by Plaintiffs Neutral Gray Music, Naughty Music, Pure Love Music, Uh Oh Entertainment, Inc, Wut' Shawan-a Do Music, Inc, DSF Productions, Dorrough Music Publishing, Tarpo Music Publishing, and Notting Dale Songs for default judgment is granted. Dkt 16.

1. Background

Default has already entered in this action. Dkts 18, 19. The facts alleged by Plaintiffs in the complaint and supporting affidavits are thus accepted as true. See *Nishimatsu Construction Co v Houston National Bank*, 515 F2d 1200, 1206 (5th Cir 1975) (citations omitted).

Plaintiffs own the copyrights in numerous songs in the R&B/hip-hop genre, including the recordings at issue of *Too Close* (by Robert L. Huggar, Raphael Brown, Keir Gist, Denzil Miller, Robert Ford, Kurtis Walker, Lawrence Smith, and J.B. Moore), *Walk That Walk* (by Dorwin Dorrough and Justin Joseph

Rogers), and *Tipsy* (by Jerrell C. Jones (professionally known as J-Kwon), Joe Kent, and Mark Williams). Dkt 1 at Schedule A. Plaintiffs license their songs through the American Society of Composers, Authors and Publishers. Id at ¶ 14.

Defendants own and operate a bar called The Republic House in Pasadena, Texas. Plaintiffs allege that Defendants supervised and controlled its activities, including public performances of the copyrighted songs at issue. Id at ¶¶ 5–13. ASCAP suspected The Republic House of infringement. Beginning in January 2016, it contacted Defendants numerous times to offer licenses to perform the songs, while also repeatedly warning them that unauthorized performances could have legal consequences. See Dkts 16-2 through 16-15. Defendants never sought to acquire the necessary license. ASCAP then had an independent investigator visit The Republic House in April 2019. He observed and heard the songs in question being “performed live” for the crowd numerous times by a DJ. Dkt 16-23 at ¶¶ 7, 9–10.

Plaintiffs brought action for copyright infringement against Defendants in October 2019 under 17 USC § 101 *et seq.*, with apparent emphasis on § 106(4). Dkt 1. They assert three instances of copyright infringement arising from the unauthorized public performances of the subject songs. They seek statutory damages pursuant to 17 USC § 504(c)(1), attorney fees and costs pursuant to 17 USC § 505, postjudgment interest pursuant to 28 USC § 1961, and injunctive relief pursuant to 17 USC § 502.

It has previously been established that Defendants were properly served. They didn’t answer or otherwise respond. The request by Plaintiffs for entry of default was granted. Dkt 17. The Clerk then entered default against them both. Dkts 18, 19. Plaintiffs now move for default judgment. Dkt 16.

2. Legal standard

Rule 55 of the Federal Rules of Civil Procedure governs default proceedings. This involves sequential steps of default, entry of default, and default judgment. A *default* occurs “when a defendant has failed to plead or otherwise respond to the complaint within the time required by the Federal Rules.” *New*

York Life Insurance Co v Brown, 84 F3d 137, 141 (5th Cir 1996). An *entry of default* is what the clerk enters when a plaintiff establishes the default by affidavit or otherwise pursuant to Rule 55(a). A *default judgment* can thereafter enter against a defendant upon application by a plaintiff pursuant to Rule 55(b)(2).

The Fifth Circuit instructs that a default judgment is “a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations.” *Sun Bank of Ocala v Pelican Homestead & Savings Association*, 874 F2d 274, 276 (5th Cir 1989) (citations omitted). A plaintiff isn’t entitled to a default judgment as a matter of right, even if default has been entered against a defendant. *Lewis v Lynn*, 236 F3d 766, 767 (5th Cir 2001). Rather, a default judgment “must be supported by well-pleaded allegations and must have a sufficient basis in the pleadings.” *Wooten v McDonald Transit Associates, Inc*, 788 F3d 490, 498 (5th Cir 2015) (internal quotations omitted). The well-pleaded allegations in the complaint are assumed to be true, except those regarding damages. *Nishimatsu*, 515 F2d at 1206.

The decision to enter a judgment by default is discretionary. *Stelax Industries, Ltd v Donahue*, 2004 WL 733844, *11 (ND Tex). “Any doubt as to whether to enter or set aside a default judgment must be resolved in favor of the defaulting party.” *John Perez Graphics & Design, LLC v Green Tree Investment Group, Inc*, 2013 WL 1828671, *3 (ND Tex), citing *Lindsey v Prive Corp*, 161 F3d 886, 893 (5th Cir 1998).

3. Analysis

Defendants have defaulted. That’s already been decided, with entry of default having been made against them. See Dkts 18, 19. The remaining question concerns the propriety of entering default judgment.

Three inquiries pertain to that consideration. The first is whether the entry of default judgment is procedurally warranted. The next is whether the substantive merits of the plaintiff’s claims as stated in the pleadings provide a sufficient basis for default judgment. The last is whether the plaintiff should receive relief and, if so, what kind and amount. For example, see *Nasufi v King Cable, Inc*, 2017 WL 6497762, *1–2 (ND Tex); *United States v*

1998 Freightliner, 548 F Supp 2d 381, 384 (WD Tex 2008); *Joe Hand Promotions, Inc v Casison*, 2019 WL 3037074, *2 (SD Tex).

a. Procedural requirements

The following factors are pertinent to decision whether default judgment is procedurally appropriate:

- *First*, whether material issues of fact are in dispute;
- *Second*, whether there has been substantial prejudice to the plaintiff;
- *Third*, whether the grounds for default are clearly established;
- *Fourth*, whether the default was caused by a good-faith mistake or excusable neglect on the defendant's part;
- *Fifth*, whether default judgment is inappropriately harsh under the circumstances; and
- *Sixth*, whether the court would think itself obliged to set aside the default upon motion by the defendant.

Lindsey, 161 F3d at 893, citing Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2685 (West 3d ed 1998).

First, Plaintiffs' well-pleaded allegations against Defendants are assumed to be true. See *Nishimatsu*, 515 F2d at 1206. Neither has defended this action, and so no material facts appear to be in dispute. See *Innovative Sports Management, Inc v Martinez*, 2017 WL 6508184, *3 (SD Tex).

Second, Plaintiffs have naturally experienced substantial prejudice. ASCAP contacted Defendants numerous times to offer licenses to perform the copyrighted songs, with warnings to them about the legal consequences of unauthorized performances. See Dkts 16-1 through 16-15. Defendants didn't respond and likewise haven't defended this action, effectively halting the adversarial process. See *China International Marine Containers, Ltd v Jiangxi Oxygen Plant Co*, 2017 WL 6403886, *3 (SD Tex); *Insurance Co of the West v H&G Contractors, Inc*, 2011 WL 4738197, *3 (SD Tex).

Third, the Clerk properly entered default against Defendants pursuant to Rule 55(a) because they didn't answer or otherwise defend this action. Dkts 18, 19. Default judgment is likewise proper because they still haven't answered or otherwise defended. See *United States v Padron*, 2017 WL 2060308, *3 (SD Tex); *WB Music Corp v Big Daddy's Entertainment, Inc*, 2005 WL 2662553, *2 (WD Tex).

Fourth, nothing suggests that the default by Defendants has been the product of good-faith mistake or excusable neglect. See *Insurance Co of the West*, 2011 WL 4738197 at *3; *Innovative Sports Management*, 2017 WL 6508184 at *3; *Lindsey*, 161 F3d at 893.

Fifth, nothing suggests that it would be too harsh to enter default judgment against Defendants, neither of whom have taken any steps to respond to this suit. See *Joe Hand Promotions, Inc v 2 Tacos Bar & Grill, LLC*, 2017 WL 373478, *2 (ND Tex), citing *Lindsey*, 161 F3d at 893; *Insurance Co of the West*, 2011 WL 4738197 at *3. Indeed, Plaintiffs attempted to resolve this dispute with proper licensing before bringing suit. And Defendants have had over fifteen months to respond to Plaintiffs' complaint, further mitigating any perception of harshness from entry of default judgment. See *Insurance Co of the West*, 2011 WL 4738197 at *3, citing *Lindsey*, 161 F3d at 893.

Sixth, nothing suggests that a default judgment would be set aside were Defendants to later challenge it. See *Insurance Co of the West*, 2011 WL 4738197 at *3 (citations omitted).

Entry of default judgment pursuant to Rule 55(b) is procedurally appropriate.

b. Substantive requirements

Even though Defendants are deemed to have admitted the allegations in the complaint because of their default, there still must be "a sufficient basis in the pleadings for the judgment entered." *Nishimatsu*, 515 F2d at 1206. This is so because a default judgment is valid "only so far as it is supported by well-pleaded allegations, assumed to be true." *Ibid*.

As such, the inquiry is whether the complaint satisfies Rule 8 of the Federal Rules of Civil Procedure. See *Wooten*, 788 F3d at 497–98. Rule 8(a)(2) requires a plaintiff's complaint to provide

“a short and plain statement of the claim showing that the pleader is entitled to relief.” The Supreme Court holds that this “does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v Iqbal*, 556 US 662, 678 (2009), quoting *Bell Atlantic Corp v Twombly*, 550 US 544, 555 (2007). The familiar standard under Rule 12(b)(6) is that a complaint must contain enough facts to state a claim to relief that is plausible on its face. *Twombly*, 550 US at 570. And a claim has *facial plausibility* “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 US at 678, citing *Twombly*, 550 US at 556.

Plaintiffs assert under 17 USC § 106(4) that they own the copyrights in the songs at issue and thus have the exclusive right to perform the songs publicly and to authorize others to do the same. They seek to enforce this right by claim against Defendants for copyright infringement under 17 USC § 501(a). Plaintiffs must establish in this regard that:

- *First*, the subject compositions are original and that they are either the authors or obtained all rights initially belonging to the authors;
- *Second*, they complied with all formalities required to secure a copyright under Title 17;
- *Third*, they are the proprietors of the copyrights of the compositions involved in this action;
- *Fourth*, the compositions were performed publicly; and
- *Fifth*, Defendants hadn’t received permission from them or their representatives for such performances.

See *Broadcast Music, Inc v Midtown Beverage, LLC*, 2013 WL 3554406, *2 (SD Tex), citing *Fermata International Melodies, Inc v Champions Golf Club, Inc*, 712 F Supp 1257, 1259 (SD Tex 1989), affd 915 F2d 1567 (5th Cir 1990); see also 37 CFR § 202.3(a)(3).

First, the complaint alleges that the songs at issue are original and lists the authors and publication dates of each. Dkt 1 at ¶¶ 20–21 & Schedule A.

Second, the complaint alleges that the songs at issue “have been printed and published in conformity with Title 17 of the United States Code.” Dkt 1 at ¶ 21. The complaint further alleges that Plaintiffs have “complied in all respects with Title 17 of the United States Code, secured the exclusive rights and privileges in and to the copyright of each composition . . . and received from the Register of Copyrights a Certificate of Registration.” Id at ¶ 22.

Third, the complaint alleges that Plaintiffs are “the owners of the copyrights in the original musical compositions” at issue. Dkt 1 at ¶¶ 4, 27. Plaintiffs have also provided the sworn declaration of a manager of business and legal affairs at ASCAP to verify that Plaintiffs own copyrights for the three songs. Dkt 16-2 at 6–7.

As to each of the first three elements, Plaintiffs have also provided the federal copyright registration certificates of the at-issue songs to further establish originality and authorship and that they obtained all rights under the copyrights initially belonging to the authors of those songs. See Dkts 16-16 through 16-18. Courts routinely hold that such certificates provide *prima facie* evidence of the first three elements. *Fermata International Melodies*, 712 F Supp at 1259 (quotation omitted); *EMI April Music v Jet Rumeurs, Inc*, 632 F Supp 2d 619, 622 (ND Tex 2008) (citation omitted).

Fourth, the complaint alleges that the subject songs were publicly performed at The Republic House on the 13th and 14th of April 2019. Dkt 1 at ¶¶ 23–24; see also id at Schedule A. The affidavit by the ASCAP investigator further supports this fact. See Dkt 16-23. It is well-established that the live performance by a DJ of a recorded song constitutes a public performance under 17 USC § 101. For example, see *EMI April Music*, 632 F Supp 2d at 623; *Warner Brothers-Seven Arts v Kalantzakis*, 326 F Supp 80, 81–82 & n 4 (SD Tex 1971); *Islandsoul Music, LLC v Hall*, 2008 WL 11333886, *9 (WD Tex).

Fifth, the complaint alleges that Plaintiffs never authorized Defendants to perform their copyrighted songs. Dkt 1 at ¶ 24. The sworn declaration by ASCAP’s manager of business and legal affairs also supports this fact. See Dkt 16-2 at 4–6.

The complaint also sufficiently establishes that both Defendants are liable for the acts of infringement. All participants in the infringement of copyright can be liable as joint tortfeasors. *Fermata International Melodies*, 712 F Supp at 1262. And so, liability falls not only on the person who actually performed the copyrighted songs, but also on those who had the ability and right to supervise the activity causing infringement and had a financial stake in the activity. *Suncoast Post-Tension, Ltd v Scoppa, et al*, 2014 WL 12596472, *4 (SD Tex), citing *Fermata International Melodies*, 712 F Supp at 1262; *Yesh Music v Lakewood Church*, 2012 WL 524187, *6 (SD Tex), citing *Broadcast Music, Inc v Hobi, Inc*, 20 F3d 1171, 1994 WL 144812, *2 (5th Cir 1994, unpublished). Plaintiffs here allege that Defendants had control over the infringing activity because they supervised the performances of the songs at issue. Dkt 1 at ¶ 6. Plaintiffs also allege that Defendants had a financial stake in the activity because the songs were performed “during the hours that the establishment is open to the public for business and presenting musical entertainment.” *Id* at ¶ 19.

The merits of the claims as pleaded in the complaint provide a sufficient basis for entry of default judgment.

c. Appropriate remedies

Plaintiffs seek \$21,000.00 in statutory damages and \$10,210.58 in costs and fees, along with interest. Dkt 16 at 12. They previously sought injunctive relief. See Dkt 1 at 6. But no such request appears in their motion for default judgment.

As to statutory damages. Rule 55(b)(2) provides for hearing for an accounting or to determine the amount of damages. Damages ordinarily may not be awarded upon default judgment “without a hearing or a demonstration by detailed affidavits establishing the necessary facts.” *United Artists Corp v Freeman*, 605 F2d 854, 857 (5th Cir 1979). But the court needn’t undertake a formal evidentiary hearing where the requested damages can be “determined with certainty” from the pleadings and supporting documents and a hearing would reveal no pertinent information. *James v Frame*, 6 F3d 307, 310–11 (5th Cir 1993).

A copyright owner is entitled to recover either actual or statutory damages. 17 USC § 504(c)(1). Statutory damages may

range between \$750 and \$30,000 per infringement. *Ibid.* Courts have wide discretion when awarding damages within those bounds. *F.W. Woolworth Co v Contemporary Arts, Inc*, 344 US 228, 231–32 (1952). But they are guided by the principle that complying with the copyright laws should be less costly than violating them—meaning that statutory damages should be sufficient to deter future copyright infringement. *EMI April Music*, 632 F Supp 2d at 625, citing *Frank Music Co v Metro-Goldwyn-Mayer, Inc*, 886 F2d 1545, 1554 (9th Cir 1989).

Plaintiffs provided a rate schedule establishing that the market value of a license fee covering performances of the songs at issue from January 2016 through November 2019 was approximately \$7,000. Dkt 16-2 at 8; Dkts 16-19, 16-20, 16-22. The sworn declaration by ASCAP’s manager of business and legal affairs confirms this estimate. Dkt 16-2 at 8. Plaintiffs thus request statutory damages of approximately three times the amount of licensing fees.

Courts readily award statutory damages between two and three times the amount of the license fee refused by defendants where the infringement was willful. For example, see *Broad Music Inc v Texas Border Management Inc*, 11 F Supp 3d 689, 698 (ND Tex 2014) (\$180,000 awarded, less than \$90,000 in license fees owed); *EMI April Music*, 632 F Supp 2d at 625 (\$8,000 awarded, \$2,400 in license fees owed); *Meadowgreen Music Co v Voice in the Wilderness Broad Inc*, 789 F Supp 823, 827 (ED Tex 1992) (\$52,500 awarded, \$24,700 in license fees owed). With a finding of willfulness, the award is oftentimes higher. See *Joe Hand Promotions, Inc v Bella’s Bar & Grill LLC*, 2020 WL 6585717, *6 (SD Tex) (collecting citations supporting three to five times multiplier, and awarding five times license fees owed). But courts have awarded a two- to three-times multiplier even without an express finding of willfulness. See *Broadcast Music, Inc v Bentley*, 2017 WL 782932, *4 (WD Tex) (\$30,000 awarded, \$18,000 in license fees owed); *Broadcast Music, Inc v Olivia’s Corp*, 2014 WL 12603108, *4 (ND Tex) (\$15,000 awarded, \$4,924.20 in license fees owed); *Broadcast Music, Inc v Bandera Cowboy Bar, LLC*, 2010 WL 11597871, *2 (WD Tex) (\$23,000 awarded, \$11,500 in license fees owed); *Broadcast Music, Inc v Triple L Vending, Inc*, 1987

WL 45244, *4 (WD Tex) (\$15,000 awarded, \$5,000 in license fees owed).

The complaint doesn't specifically assert willfulness. But the conduct alleged—including the failure to respond to repeated requests for a license—certainly establishes it. For example, see *Swallow Turn Music v Wilson*, 831 F Supp 575, 579–80 (ED Tex 1993) (citations omitted); *Broadcast Music, Inc v Bostock Billiards & Bar Association*, 2013 WL 12126268, *2 (ND Tex); *Cullum v Diamond A Hunting, Inc*, 2010 WL 5817541, *5 (WD Tex) (citations omitted), affd, 484 F Appx 1000 (5th Cir 2012, *per curiam*); *Flonserve Corp v Hallmark Pump Co*, 2011 WL 1527951, *6 (SD Tex) (citations omitted). As such, a three-times multiple on the requested license fee isn't excessive as statutory damages and is sufficient to deter future copyright violations. *EMI April Music*, 632 F Supp 2d at 625.

Plaintiffs will be awarded \$21,000.00 in statutory damages.

As to attorney fees and costs. An award of reasonable attorney fees and costs to prevailing parties is specifically provided under 17 USC § 505. This means that fee awards in copyright infringement cases “are the rule rather than the exception and should be awarded routinely.” *Virgin Records America, Inc v Thompson*, 512 F3d 724, 726 (5th Cir 2008), citing *McGaughey v Twentieth Century Fox Film Corp*, 12 F3d 62, 65 (5th Cir 1994). But courts are guided by factors such as “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *McGaughey*, 12 F3d at 65, quoting *Lieb v Topstone Industry, Inc*, 788 F2d 151, 156 (3rd Cir 1986).

Nothing suggests that the rule in favor of routine award of fees and costs shouldn't pertain here. See *EMI April Music*, 632 F Supp 2d at 627. Defendants refused to obtain a license for the songs that their DJ publicly performed. Such conduct necessitated this litigation. And they have refused to participate in this action once haled into federal court.

Plaintiffs seek \$10,210.58 in attorney fees and costs and \$393.82 in investigative costs. They have provided declarations establishing those modest requests. Dkt 16-25 at 2; Dkt 16-26.

Such fees and costs are reasonable under the circumstances. *KingVision Pay-Per-View, Ltd v Popoca*, 2007 WL 9754680, *1 (SD Tex).

Plaintiffs will be awarded a total of \$10,604.40 in attorney fees and costs.

As to postjudgment interest. 28 USC § 1961(a) provides, “Interest shall be allowed on any money judgment in a civil case recovered in a district court.” District courts lack discretion to deny such interest on monetary judgments. *Joy Pipe, USA, LP v ISMT Ltd*, 703 F Appx 253, 259 (5th Cir 2017), citing *Meaux Surface Protection, Inc v Fogleman*, 607 F3d 161, 173 (5th Cir 2010).

Plaintiffs seek an award of postjudgment interest, as is their right. Dkt 16 at 12. It will be awarded at the applicable federal rate from the date of judgment until the judgment is paid in full.

4. Conclusion


The motion by Plaintiffs Neutral Gray Music, Naughty Music, Pure Love Music, Uh Oh Entertainment, Inc, Wut’ Shawan-a Do Music, Inc, DSF Productions, Dorrough Music Publishing, Tarpo Music Publishing, and Notting Dale Songs for default judgment against Defendants Tri-City Funding & Management, LLC and Clint Smith is GRANTED. Dkt 16.

Defendants are ORDERED to pay Plaintiffs \$21,000.00 in statutory damages and \$10,604.40 in attorney fees and costs.

This judgment is subject to postjudgment interest pursuant to 28 USC § 1961 at the applicable federal rate from the date of judgment until paid in full.

SO ORDERED.

Signed on March 30, 2021, at Houston, Texas.


Hon. Charles Eskridge
United States District Judge

Applicant Details

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 Last Name **Lee**
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BA/BS From **University of Maryland-College Park**
 Date of BA/BS **December 2016**
 JD/LLB From **The George Washington University Law School**
<https://www.law.gwu.edu/>
 Date of JD/LLB **May 16, 2021**
 Class Rank **I am not ranked**
 Law Review/Journal **Yes**
 Journal(s) **The George Washington Law Review**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/
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Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

HEEWON LEE

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August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year student at The George Washington University Law School and I am writing to apply for a 2021-2023 term clerkship in your chambers. I would welcome the opportunity to serve your chambers as a law clerk and learn from your experience as a judge.

Enclosed please find my resume, transcripts, and a writing sample. Letters of recommendation from the following people will arrive separately:

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jmanns@law.gwu.edu
(202) 994-4645

I welcome the opportunity to speak with you about how my qualifications and diverse background can contribute to your chambers. Please let me know if I can provide any additional information. I can be reached by phone at 443-707-0295, or by email at hlee12@law.gwu.edu. Thank you very much for considering my application.

Respectfully,

Heewon Lee

Heewon Lee

HEEWON LEE

5110 Dudley Ln, Apt 302 • Bethesda, MD 20814 • 443-707-0295 • hlee12@law.gwu.edu

EDUCATION

The George Washington University Law School

Juris Doctor (GPA: 3.44)

Award: CALI Award for Highest Grade in Legal Writing

Journal: *The George Washington Law Review*

Activities: Student Bar Association (Transfer Student Senator, Director of Transfer Student Affairs);

Asian-Pacific American Law Student Association

Washington, DC

Expected, May 2021

University of Maryland

Bachelor of Science in Accounting

Minor: Technology Entrepreneurship

Activities: Korean Business and Economics Student Association, Vice President

College Park, MD

December 2016

EXPERIENCE

U.S. Department of Justice, Criminal Division, Fraud Section

Intern

Washington, D.C.

Expected August 2020 – November 2020

PricewaterhouseCoopers

Corporate Tax Intern

McLean, VA

July 2020

- Participated in select phases of tax compliance engagements
- Researched tax laws, rules, regulations, and industry and analyzed their application to specific situations
- Drafted memoranda to defend decisions and outlined solutions to tax issues

U.S. District Court for the Central District of California

Judicial Extern for The Hon. André Birotte Jr.

Los Angeles, CA

May 2019 – August 2019

- Drafted memoranda, decisions, and orders on motions to dismiss and motions *in limine* regarding copyright infringement, breach of contracts, and product liability issues
- Observed and assisted with trial preparation including drafting jury instructions and bench memoranda
- Conducted research on case law and statutes to analyze parties' claims

Internal Revenue Service, Volunteer Income Tax Assistance Program

Tax Assistant

Brooklyn, NY

January 2019 – April 2019

- Provided free tax preparation services for eligible taxpayers with the electronic filing software
- Assisted clients with low incomes, people with disabilities, the elderly and limited English-speakers in obtaining refunds and credits
- Conducted client intake and responded to inquiries regarding tax issues

Civil Legal Advice and Resource Office

Student Participant

Brooklyn, NY

October 2018 – December 2018

- Summarized details on actions against consumer debtors and reopened defaults
- Assisted in counseling clients on representing themselves at trial and completed answer, motion and discovery forms
- Drafted responses to summons, available defenses, and motions for relief

Howden Broking Group

Accounting Intern

Seoul, South Korea

January 2017 – June 2017

- Collaborated with management regarding shares and commissions of company adjustment
- Coordinated with supervisors on inventory adjustment and month-end financial reports
- Organized files for audit and completed miscellaneous special projects for the accounting department

LANGUAGES, SKILLS AND INTERESTS

Fluent in Korean; Interests include drawing and painting

Heewon Lee
The George Washington University Law School
Cumulative GPA: 3.44

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Appellate Practice		B+	2	
Banking Law		B+	3	
Corporations		A-	4	
Federal Income Taxation		B+	4	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Creditor Rights/Debtor Protection		CR	3	
Evidence		CR	4	
Federal Courts		CR	4	
Professional Responsibility/Ethic		CR	2	

The school followed a mandatory credit/no-credit (CR/NC) grading system for all law school courses offered during the Spring 2020 semester.

Heewon Lee
Brooklyn Law School
Cumulative GPA: 3.43

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure		A-	5	
Criminal Law		B+	3	
Fundamentals of Law Practice		A	2	Legal Writing
Torts		B	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law		A-	5	
Contracts		B	5	
Fundamentals of Law Practice 2		A	2	Legal Writing
Property		B+	4	

The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to strongly recommend Heewon Lee for a clerkship. Heewon was a strong student in both my Corporations and Banking Law classes during the 2019-2020 academic year. In class discussions she consistently demonstrated mastery of the material and the creativity necessary to analyze difficult legal arguments. Heewon wrote an insightful research paper for my Banking Law class on the case for a federal FinTech sandbox, which called for relaxed regulation for financial start-ups. Heewon has also worked in a number of externships which have given her a well-rounded perspective on a range of legal issues. While Heewon is still early on in her legal career, I believe she has the potential to become a very effective lawyer.

Please call me at (202) 994-4645 or e-mail me at jmanns@law.gwu.edu if you have any questions about Heewon.

Sincerely yours,

Jeffrey Manns
Professor of Law
George Washington University

Jeffrey Manns - jmanns@law.gwu.edu

The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write in support of the clerkship application of a rising 3L student at The George Washington University Law School, Heewon Lee. Mr. Lee has a strong record and, although he does not have the highest grades in his class, he showed me considerable strengths in my Spring 2020 Evidence course.

Before attending law school Mr. Lee earned his bachelor's degree in accounting at the University of Maryland where he took courses in business law and taxation. He worked at the Howden Broking Group as an accounting intern, assisting with international mergers by researching and organizing insurance, accounting, and financial data.

He began law school at the Brooklyn Law School, where he was selected to be a member of the Moot Court Honor Society and the Journal of International Law. His academic record at Brooklyn attracted him to GW to complete his law school training. Here he has earned membership in The George Washington Law Review; won the CALI Award for highest grade in his legal writing class; and served as a judicial extern conducting substantial, targeted research. As an intern he had an opportunity to hone his research and writing skills as he assisted in drafting jury instructions and bench memoranda and prepared analyses on patent infringement, breach of contract and product liability issues.

Mr. Lee has demonstrated a commitment to public service. During his first year of law school, he volunteered with the Internal Revenue Service, where he interviewed people with low incomes and disabilities, the elderly, and limited English-speaking taxpayers and assisted them in preparing their tax returns. He also volunteered with the Kings County Civil Court, where he helped consumer debtors and victims of identity theft in resolving legal problems. He was able to use his accounting knowledge and communication skills in both assignments to assist attorneys in providing legal services to diverse clients.

I commend Mr. Lee to you.

Sincerely yours,

Stephen A. Saltzburg

Stephen Saltzburg - ssaltz@law.gwu.edu - (202) 994-7089

HEEWON LEE

5110 Dudley Ln, Apt 302 • Bethesda, MD 20814 • 443-707-0295 • hlee12@law.gwu.edu

This writing sample is an order that I wrote during my time as an extern with Judge André Birotte Jr. at the United States District Court in the Central District of California. Names of parties and document numbers have been changed for confidentiality.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

F. Scott Fitzgerald, Inc., a California corporation,
Plaintiff,
v.
Jay Gatsby, an individual; Francis Cugat, LLC, a
Massachusetts limited liability company; and
DOES 1-10, inclusive,
Defendants.

Case No. 1:23-cv-456789-AB-CD

**ORDER DENYING DEFENDANT’S
MOTION TO DISMISS**

Before the Court is Defendant Jay Gatsby’s (“Defendant”) Motion to Dismiss Complaint for Lack of Personal Jurisdiction. (“Mot.,” Dkt. No. 16). Plaintiff F. Scott Fitzgerald, Inc. (“Plaintiff”) filed an opposition, and Defendant filed a reply. The Court heard oral argument on June 21, 2019. For the following reasons, the Court **DENIES** the Motion.¹

I. FACTUAL BACKGROUND

Plaintiff is a California corporation having its principal place of business in California. Complaint (“Compl.” Dkt. No. 1), ¶ 6. Defendant is a resident of Massachusetts. Compl. ¶ 7. Defendant is a co-founder, co-owner, officer, manager and operator of Francis Cugat, LLC (“Cugat”), which has its principal place of business in Massachusetts. Compl. ¶¶ 8, 9; Declaration of Jay Gatsby (“Gatsby Decl.,” Dkt. No. 16-1), ¶ 2. Both Plaintiff and Cugat sell recovery and mobility rollers through online marketplaces such as Amazon and Walmart. Compl. ¶ 32.

¹ The Court **DENIES** Plaintiff’s ex parte application to file a surreply. Dkt. No. 30.

On March 8-11, 2017, Defendant attended the IHRSA convention² in Los Angeles, California “in [his] official capacity as an officer of Cugat to meet prospective clients of Cugat and to discuss with Cugat’s technology.” Compl. ¶ 34; Gatsby Decl. ¶ 4. While there, Defendant approached Tom Buchanan (“Buchanan”), Plaintiff’s CEO, at Plaintiff’s booth to discuss the Plaintiff’s rollers (“Plaintiff’s Products”) in view of various patent rights Defendant represented he owned. Compl. ¶ 34; Gatsby Decl. ¶ 4. Defendant alleges that he discussed a potential opportunity to license Cugat’s patents. *Id.* Plaintiff claims that Defendant accused Plaintiff of patent infringement – specifically, the ‘123 Patent and the ‘456 Patent (collectively, “the Patents”). Declaration of Tom Buchanan (“Buchanan Decl.,” Dkt. No. 26-1), ¶¶ 3-6, 10; Compl. ¶ 1. The Patents were issued in 2017, naming Defendant as the sole inventor. Compl. ¶¶ 14-22. The United States Patent and Trademark Office (“USPTO”) assignments database shows that assignments of the Patents from Defendant to Cugat were recorded. Supplemental Declaration of Jay Gatsby (“Supp. Gatsby Decl.,” Dkt. No. 27-1), ¶¶ 4-5, and Exs. A and B.

Plaintiff claims that after the IHRSA, Defendant continued accusing Plaintiff of patent infringement for several weeks while outside California. Buchanan Decl. ¶¶ 11-14. On March 15, 2017, Defendant sent Plaintiff copies of several patents and a copy of a then-pending patent application, which are owned by Cugat, not Defendant. Compl. ¶ 35; Gatsby Decl. ¶ 7. Defendant says that he did this to try to negotiate a license agreement between Plaintiff and Cugat as part of his duties as an officer of Cugat. Gatsby Decl. ¶ 7. Defendant offered to visit Plaintiff’s offices in Los Angeles in May 2017 but later cancelled. Compl. ¶ 37; Buchanan Decl. ¶ 12. Plaintiff denies infringing on Defendant’s patents. Compl. ¶¶ 36-37.

² The IHRSA convention is the International Health, Racquet and Sportsclub Association’s annual convention and trade show where attendees can meet with decision-makers who purchase products and services. Gatsby Decl. ¶ 4.

A year later, on June 19, 2018, Defendant submitted a patent infringement complaint to Amazon, a Washington company, mentioning that he is “the inventor of” the Patents and referring the Patents as his patents. Supp. Gatsby Decl. Ex. B, p. 2. On June 22, 2018, Plaintiff received an email from Amazon, saying that Defendant asked Amazon requesting removal of the Plaintiff’s Products from Amazon’s marketplace. *Id.* at ¶ 43; Buchanan Decl. ¶ 15, Ex. A p. 1. Amazon’s email identified “Jay Gatsby” as the “rights owner.” Buchanan Decl. ¶ 15, Ex. A, p. 1. Thereafter, Amazon removed Plaintiff’s Products from its online marketplace. Compl. ¶¶ 45-46; Buchanan Decl. ¶ 16. Amazon refuses to reinstate Plaintiff’s Products unless it receives a “valid retraction” from the identified “rights owner who reported the infringing content.” Compl. ¶¶ 49, 51, 53, 55.

On July 25, 2018, Plaintiff sent a letter to Defendant, requesting that Defendant deliver to Amazon a retraction notice to reinstate the [Plaintiff’s Products] on the basis that the Plaintiff’s Products do not infringe Defendant’s patents. Compl. ¶ 56. Then, on August 17, 2018, Plaintiff received a response from the law firm Bulls & Furse, LLP (“BF”) (“Cugat Response”) that BF represents Cugat, not Defendant, and states that Cugat “will not dispute [Plaintiff’s] findings” that the Plaintiff’s Products do not infringe the Patents. Compl. ¶¶ 58-60. To date, Defendant has not sent Amazon a retraction notice withdrawing the patent infringement claims. Compl. ¶¶ 57, 62.

On December 10, 2018, Defendant submitted a patent infringement complaint to Walmart, an Arkansas company, asking Walmart to remove Plaintiff’s products from Walmart’s online market. Compl. ¶ 66. Defendant asserts that he talked to Amazon and Walmart solely as an officer of Cugat. Gatsby Decl. at ¶ 9.

Defendant now moves to dismiss for lack of personal jurisdiction, arguing that under the fiduciary shield doctrine, his contacts with California do not give rise to personal jurisdiction over him in his personal capacity because all of that conduct was in his official capacity on behalf of Cugat. Plaintiff argues that the fiduciary shield doctrine does not protect Defendant because he was the primary and sole participant in the conduct that gave rise to Plaintiff's claims.

II. LEGAL STANDARD

When a defendant moves to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(2) without holding an evidentiary hearing, the plaintiff has "the burden of establishing personal jurisdiction but need[s] to make only a prima facie showing of jurisdictional facts to avoid a motion to dismiss." *Elecs. for Imaging, Inc. v. Coyle*, 340 F.3d 1344, 1349 (Fed. Cir. 2003). The court assumes that uncontroverted allegations in the plaintiff's complaint are true. *Id.* Conflicts between the parties' declarations must be resolved in the plaintiff's favor. *Id.*

III. DISCUSSION

Plaintiff asserts three claims arising under patent law, and five other claims related to these three patent claims. The parties argue whether Ninth Circuit law or Federal Circuit law prevails in this case. Federal Circuit law governs personal jurisdiction in patent infringement cases. *Nuance Comms., Inc. v. Abby Software House*, 626 F.3d 1222, 1230 (Fed. Cir. 2010) ("The law of the Federal Circuit, rather than that of the regional circuit in which the case arose, applies to determine whether the district court properly declined to exercise personal jurisdiction over an out-of-state accused [patent] infringer"); see also *Grober v. Mako Prods., Inc.*, 686 F.3d 1335, 1345 (Fed. Cir. 2012) ("[W]e apply Federal Circuit law because the jurisdictional issue is

intimately involved with the substance of the patent laws”) (citations and internal quotations omitted).

Under Federal Circuit law, personal jurisdiction over a nonresident defendant is proper if permitted by a state’s long-arm statute and if the exercise of that jurisdiction does not violate federal due process. *Nuance Comms., Inc.*, 626 F.3d at 1230. “Under California’s long-arm statute, California state courts may exercise personal jurisdiction ‘on any basis not inconsistent with the Constitution of this state or of the United States.’” *Daimler AG v. Bauman*, 134 U.S. 746, 753 (2014); *see also* Cal. Code Civ. Proc. § 410.10. Thus, “[b]ecause California’s long-arm statute is co-extensive with federal due process requirements, the jurisdictional analyses under California law and federal law are the same.” *Nuance Comms.*, 626 F.3d at 1230 (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004)).

Due Process requires that a nonresident defendant have “certain minimum contacts” with the forum state such that “maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The defendant’s “conduct and connection with the forum state” must be such that the defendant “should reasonably anticipate being haled into court there.” *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980). Two types of jurisdiction satisfy this minimum contacts requirement: general jurisdiction and specific jurisdiction.

Here, Plaintiff does not contend that general jurisdiction exists, so the Court will not address it. Rather, Plaintiff contends that the Court has specific jurisdiction over Defendant. Defendant responds, however, that under the fiduciary shield doctrine, his conduct does not expose him to personal jurisdiction in California because all of his conduct was in his capacity as an officer and/or employee of Cugat and was not performed in his personal capacity. Plaintiff

responds that Defendant's conduct is not protected by the fiduciary shield doctrine. Thus, the threshold issue before the Court is whether the fiduciary shield doctrine applies.

A. The Fiduciary Shield Doctrine Does Not Apply

The parties do not argue that the fiduciary doctrine differs between the Ninth Circuit and Federal Circuit, and it does not appear to the Court that they differ. In fact, the Federal Circuit has relied on at least one Ninth Circuit when discussing the fiduciary shield doctrine. *See Grober*, 686 F.3d at 1347 (citing *Kransco Mfg., Inc. v. Markwitz*, 656 F.2d 1376, 1379 (9th Cir. 1981)). Thus, the Court will consider cases from both Circuits in assessing this issue.

"The fiduciary shield doctrine buffers corporate officers from personal jurisdiction when their official duties were their only contact with a forum state." *Grober*, 686 F.3d at 1347 (citing *Kransco Mfg., Inc. v. Markwitz*, 656 F.2d 1376, 1379 (9th Cir. 1981)). However, the mere fact that defendants took actions constituting sufficient contacts with the state on behalf of a corporate employer does not shield the individuals from being subjected to jurisdiction. *See Calder v. Jones*, 465 U.S. 783, 790 (1984) ("Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually"); *see also Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 781 (1984) ("[W]e today reject the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity"). "Courts typically consider a corporate officer's contacts on behalf of a corporation as his or her personal contacts for purposes of personal jurisdiction when the contacts support 'some identifiable theory of liability pursuant to which [the officer's] contacts on behalf of the corporate employer may

justifiably be imputed to the employee.”’ *Allstar Mktg. Grp., LLC v. Your Store Online, LLC*, 666 F.Supp. 2d 1109, 1120 (C.D. Cal. 2009) (citation omitted).

Here, the Court accepts, for purposes of analyzing jurisdiction, Plaintiff’s allegations that Defendant attended a trade show in California; that while at the trade show in California, Defendant accused Plaintiff of patent infringement and discussed Cugat potentially selling a license to Plaintiff; and that after the tradeshow, Defendant, from outside of California, sent to Plaintiff in California copies of patents and a copy of pending patent application relevant to this case. Compl. ¶¶ 1, 34; Buchanan Decl. 26 ¶¶ 3-6, 10; Gatsby Decl. ¶ 11-13; Supp. Gatsby Decl. ¶¶ 7-8.

Defendant’s argument that all of his conduct was in his official capacity, not in his personal capacity, is a red herring, because he can be held liable for tortious conduct even in his official capacity if he was the moving force behind the corporation’s tortious conduct. *See Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1578–79 (Fed. Cir. 1986) (“It is well settled that corporate officers who actively aid and abet their corporation’s infringement may be personally liable for inducing infringement regardless of whether the corporation is the alter ego of the corporate officer”); *see also Allstar Mktg. Grp.*, 666 F.Supp. 2d at 1120 (holding that the fiduciary shield doctrine does not apply to the corporate officer who encouraged the sale of infringing products to California, because he was a “primary participant in the alleged wrongdoing or had control of, and direct participation in the alleged activities”).

Moreover, Defendant attended the California trade show to increase the visibility of Cugat to sell and license its products to the attendees at this convention. Gatsby Decl. ¶ 11. Thus, Defendant participated and encouraged the sale of Cugat’s products to Plaintiff and accused Plaintiff of patent infringement while at this trade show in California. Also, when Defendant sent

emails to Amazon and Walmart, Defendant acted with knowledge of the potential effects on Plaintiff, a California corporation. Whether Defendant performed these acts in his personal capacity or as an employee of Cugat is irrelevant because Defendant can be held liable as “the moving force behind” the alleged activity. Thus, it was Defendant’s conduct that gave rise to Plaintiff’s claims, that same conduct establishes an identifiable theory of liability against Defendant personally, and that conduct can therefore be considered for purposes of determining whether the Court has personal jurisdiction over Defendant.

Therefore, the fiduciary shield doctrine does not apply to Defendant’s conduct, so the Court will consider his conduct to determine whether he is subject to specific jurisdiction in California.

B. Defendant is Subject to Specific Jurisdiction in California

A court in the forum state has specific jurisdiction over a nonresident defendant if the plaintiff’s claim arises out of the defendant’s contacts in California. *Grober*, 686 F.3d at 1346. The Federal Circuit has stated the three-part *Akro* test for determining whether specific personal jurisdiction satisfies due process in a patent case: “(1) whether the defendant ‘purposefully directed’ its activities at residents of the forum; (2) whether the claim ‘arises out of or relates to the defendant’s activities with the forum; and (3) whether assertion of personal jurisdiction is ‘reasonable and fair.’” *3D Systems, Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1378 (Fed. Cir. 1998) (citing *Akro Corp. v. Luker*, 45 F.3d 1541, 1545-46 (Fed. Cir. 1995)). The plaintiff bears the burden of establishing the first two elements, and if met, the burden shifts to the defendant to show that exercising jurisdiction would be unreasonable. *Grober*, 686 F.3d at 1346.

a. Purposeful Direction

With respect to Defendant, the Court must first address whether its activities satisfy the first prong of the *Akro* test, i.e., whether Defendant purposefully directed its activities at residents of California. *3D Systems, Inc.*, 160 F.3d at 1378. Defendant attended a California trade show and accused Plaintiff of patent infringement while physically in California. Compl. ¶ 34; Gatsby Decl. ¶ 4; Krichevsky Decl. ¶¶ 3-6, 10. This conduct within California is enough to establish personal jurisdiction against Defendant in California, but Plaintiff points to additional contacts. Plaintiff shows that Defendant knew Plaintiff resides in California when Defendant offered to visit Plaintiff's offices in Los Angeles in May 2017. Compl. ¶ 37. Also, Defendant sent Plaintiff copies of several patents and a copy of a then-pending application. Compl. ¶ 35; Gatsby Decl. ¶ 7. This evidence establishes that Defendant knew Plaintiff is located in California. Thus, Defendant knew he was likely to inflict harm to Plaintiff in California when he allegedly complained to Amazon and Walmart about Plaintiff's infringement and caused them to remove Plaintiff's goods from their online marketplaces. Thus, Defendant's conduct was purposefully directed at a resident in the state of California, and therefore satisfies the first prong of the *Akro* test.

b. Arising Out of Contacts with California

The second prong of the *Akro* test is whether the cause of action arises out of or directly relates to those activities. *3D Systems, Inc.*, 160 F.3d at 1378. Plaintiff is suing Defendant for declaratory relief of patent non-infringement and supplemental state law claims. These claims all arise out of Defendant's California-directed conduct of accusing Plaintiff of patent infringement and telling third-party vendors that Plaintiff's Products infringed and asking them to stop selling Plaintiff's Products. The second prong of the *Akro* test, therefore, is met.

c. Exercise of Jurisdiction Is Reasonable and Fair

The third prong of the *Akro* test is whether the assertion of personal jurisdiction is reasonable and fair. *3D Systems, Inc.*, 160 F.3d at 1379; *see also Akro*, 45 F.3d at 1545-46 (“Where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable”) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985)).

This prong embodies the due process considerations of personal jurisdiction and places the burden on the party over whom jurisdiction is sought to prove that jurisdiction would be constitutionally unreasonable. *3D Systems, Inc.*, at 1379-80. Defendant asserts a significant financial burdensome. Gatsby Decl. ¶ 2; Supp. Gatsby Decl. ¶ 12. However, Defendant fails to show that how the economic hardship would be “constitutionally unreasonable.”

Additionally, none of the examples of constitutional unreasonableness listed in *Burger King* is present here. A clash between the fundamental social policies of a forum state and another state related to the action could constitutionally trump jurisdiction. *See Burger King*, 471 U.S. at 477-78. No such clash exists here. Regardless of the forum, Federal Circuit patent law will be applied to the patent claims. Although California law on unfair competition may differ from other states, Defendant has presented no arguments that there is conflict between the fundamental social policies underlying California’s unfair competition laws and the laws of other potential forums, or that some other forum’s law could apply.

Another example of constitutional unreasonableness given in *Burger King* is an inconvenient forum for the challenging party. *Id.* It is difficult to conclude that California is an inconvenient forum for Defendant in which to defend himself, when Defendant participated in a

trade show there, when Defendant clearly wanted to sell and license Cugat's products there, and when Defendant, as the sole actor on Cugat's behalf would likely have to appear at trial in California in any event. Therefore, the third prong of the *Akro* test is satisfied, and personal jurisdiction over Defendant is constitutionally reasonable. Because all three prongs of the *Akro* test are met, Defendant is subject to personal jurisdiction in California.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that it has personal jurisdiction over Defendant. Therefore, Defendant's Motion to Dismiss for lack of personal jurisdiction is

DENIED.

IT IS SO ORDERED.

Applicant Details

First Name **Julia**
 Last Name **Leopold**
 Citizenship Status **U. S. Citizen**
 Email Address julie.b.leopold@gmail.com
 Address

Address
Street
1100 North Street
City
Durham
State/Territory
North Carolina
Zip
27701
Country
United States

Contact Phone Number **3179184630**

Applicant Education

BA/BS From **Butler University**
 Date of BA/BS **May 2014**
 JD/LLB From **University of North Carolina School of Law**
<https://law.unc.edu/>
 Date of JD/LLB **May 10, 2022**
 Class Rank **50%**
 Law Review/Journal **Yes**
 Journal(s) **North Carolina Civil Rights Law Review**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/
 Externships **Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Gurvich, Rachel
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Muller, Eric
emuller@email.unc.edu
919.962.7067

Webster, Joe
pedra_lee@ncmd.uscourts.gov

References

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1L Legal Research and Writing Professor
617-640-9764
gurvich@email.unc.edu

Professor Eric Muller
1L Constitutional Law Professor
919-962-7067
emuller@email.unc.edu

Pedra Lee
United States Law Clerk to
Federal Magistrate Judge Joe Webster
Middle District of North Carolina
919-425-8902
pedra_lee@ncmd.uscourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Julie B. Leopold

jleopold@live.unc.edu | 317.918.4630

June 1, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

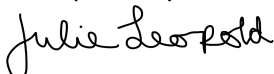
I am a rising third-year student at the University of North Carolina School of Law and am seeking consideration for a clerkship position in your chambers beginning in the Fall of 2022.

This Spring I had the opportunity to extern for the Honorable Joe Webster in the Middle District of North Carolina. There, I wrote a few orders regarding motions to dismiss, detention orders, and even a recommendation for a Social Security case. I enjoyed witnessing the advocacy in the courtroom as well as researching a wide variety of legal issues. This externship solidified my desire both to litigate and to pursue a post-graduate clerkship.

I believe that I will be a strong asset to your chambers because of my ability to collaborate as a part of a team, my strong work ethic, and my long-standing commitment to public service. First, I have learned the satisfaction that comes from being part of a team after playing competitive soccer for over twenty-five years. As a teacher I further developed my collaborative skills by working with my Professional Learning Community planning lessons and assessments with my colleagues. Also, I am hard working and am dedicated to seeking improvement every day. Since coming to law school, I have intentionally sought opportunities, such as my Research Assistant position and my Advanced Legal Research course, to continuously improve my legal research and writing skills. Finally, I have long been dedicated to public service. In college, I volunteered at a community center for refugees teaching English and helping students with their homework. After teaching high school history for five years, I decided to come to law school to pursue a wider-reaching means of serving my community. Going into my third year of law school, I have completed over 180 hours of pro bono and will serve as the Director of the Pro Bono Program this coming year.

Thank you for your time and consideration of me for a clerkship position. Please let me know if you have any questions or if I can provide any further information.

Respectfully,


Julie Leopold

Julie B. Leopold

jleopold@live.unc.edu | 317.918.4630

EDUCATION

UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW, CHAPEL HILL, NC

Expected May 2022

Juris Doctor

- Overall GPA: 3.43 (Spring Semester GPA: 3.65)
- Student Director, Pro Bono Program
- Executive Comments Editor, *North Carolina Civil Rights Law Review*
- *Access to Literacy: The Narrow Path Towards Recognizing Education as a Fundamental Right*, 2 N.C. CVL. RTS. L. REV. (forthcoming 2022)
- Dean's Fellow
- Completed over 180 pro bono hours

BUTLER UNIVERSITY, INDIANAPOLIS, IN

May 2014

Bachelor of Science with High Honors in Education

- GPA: 3.94
- Minors in Special Education and English as a New Language
- Goalkeeper on the Butler Women's Soccer Team

EXPERIENCE

STUDENT VOLUNTEER INTERN

May – July 2021

U.S. Department of Labor, Office of the Solicitor Region III, Arlington, VA

- Drafted motions in limine, proposed findings of fact and conclusions of law, settlement agreements, and other documents for use in litigation
- Reviewed documents in preparation for assisting with depositions and trial

JUDICIAL EXTERN

January – April 2021

Magistrate Judge Joe Webster, Middle District of North Carolina, Durham, NC

- Researched discrete legal questions for the Judge and his clerks
- Drafted orders for motions to dismiss, detention hearings, and Social Security recommendations

SUMMER LEGAL INTERN

May – July 2020

North Carolina Department of Justice – Environmental Division, Raleigh, NC

- Drafted memoranda, motions to dismiss, a petition for discretionary review, and other legal documents for use in both civil and criminal cases
- Assisted with virtual depositions and observed negotiations with opposing counsel

RESEARCH ASSISTANT

May – August 2020

Professor Erika Wilson, University of North Carolina School of Law, Chapel Hill, NC

- Researched existing legal scholarship on equal protection and access to education
- Synthesized research in memoranda to aid the drafting of a law review article

SOCIAL STUDIES TEACHER

August 2017 – June 2019

Northern High School, Durham, NC

- Taught Civics and Economics, American History, and Sociology at a Title I School
- Led Professional Learning Community to collaborate on curriculum and instruction



THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL
SCHOOL OF LAW

☎ 919-962-5106 | 📠 919-962-1170

Van Hecke-Wettach Hall | Campus Box 3380
160 Ridge Road | Chapel Hill, NC 27599-3380
law.unc.edu

Unofficial Transcript

Note to Employers from the Career Development Office: Grades at the UNC School of Law are awarded in the form of letters (A, A-, B+, B-, C, etc.). Each letter grade is associated with a number (A = 4.0, A- = 3.7, B+ = 3.3, B = 3.0, etc.) for purposes of calculating a cumulative GPA. An A+ may be awarded in exceptional situations. For more information on the grading system, including the current class rank cutoffs, please contact the Career Development Office at (919) 962-8102 or visit our website at <https://law.unc.edu/careers/for-employers/grading-policy-faq/>

Student Name: Julia Leopold

Cumulative GPA: 3.432

FALL 2019				
Class	Description	Units	Grade	Grade Points
LAW 201	CIVIL PROCEDURE	4.00	A-	14.800
LAW 204	CONTRACTS	4.00	B+	13.200
LAW 207	PROPERTY	4.00	B	12.000
LAW 295	RES, REAS, WRIT, ADVOC I	3.00	B	9.000

SPRING 2020				
Class	Description	Units	Grade	Grade Points
LAW 205	CRIMINAL LAW	4.00	PS	
LAW 209	TORTS	4.00	PS	
LAW 234	CONSTITUTIONAL LAW	4.00	PS	
LAW 296	RES, REAS, WRIT, ADVOC II	3.00	PS	

The Law School adopted pass/fail grades for all students to accommodate for COVID-19 in Spring 2020.

FALL 2020				
Class	Description	Units	Grade	Grade Points
LAW 220	ADMINISTRATIVE LAW	3.00	B+	9.9
LAW 242	EVIDENCE	4.00	B+	13.2
LAW 266	PROF. RESPONSIBILITY	2.00	A	8.0
LAW 267	ADVANCED LEGAL RESEARCH	3.00	B+	9.9
LAW 503	POVERTY & PUBLIC POLICY IN NC	3.00	B+	9.9
LAW 558	BLM AND THE LAW	0.500	PS	

SRING 2021				
Class	Description	Units	Grade	Grade Points
LAW 206	CRIM. PROCEDURE: INVESTIGATIONS	3.00	A	12.0
LAW 228	BUSINESS ASSOCIATIONS	4.00	B+	13.2
LAW 268	TRUSTS AND ESTATES	4.00	A-	14.8
LAW 401	EXTERNSHIP PROGRAM	3.00	PS	
LAW 491	WRITING FOR JUDICIAL CLERKSHIPS	3.00	A-	11.1
LAW 558	BLM AND THE LAW	0.500	PS	

FALL 2021				
Class	Description	Units	Grade	Grade Points
LAW 234F	FIRST AMENDMENT	3.00		
LAW 246	FEDERAL JURISDICTION	3.00		
LAW 288	TRIAL ADVOCACY	3.00	P/F	
LAW 553	CRITICAL LAWYERING CLINIC	6.00	P/F	

SPRING 2022				
Class	Description	Units	Grade	Grade Points
LAW 244	FAMILY LAW	3.00		
LAW 500	EXTERNSHIP PROGRAM	6.00	P/F	
LAW 510	ENVIRONMENTAL JUSTICE	3.00		
LAW 438	WRITING FOR THE BAR	2.00		

CUMULATIVE GPA CALCULATION	
Total Grade Points	151.000
/ Units Taken Toward GPA	44.00
= GPA	3.432

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Page No. 1

Name : Burton, Julia Elizabeth

[REDACTED]

Print Date : 2016-11-07

----- Degrees Awarded -----

Degree : Bachelor of Science
 Confer Date : 2014-05-10
 Degree Honors : Cum Laude
 Plan : Middle/Secondary Education with High Honors
 Sub-Plan : Content Area: Social Studies
 Plan : Special Education Mild Intervention Minor
 Plan : English as a New Language Minor

Course Topic(s): Identity & Culture II
 NW 210-CH Chemistry and Society 5.00 5.00 A
 PO 141S Intro International Politics 3.00 3.00 A-
 Req Designation : Indianapolis Community Requirement -- Satisfied

Fall 2011

Program : UG Education

Course	Description	Attempted	Earned	Grade	Points
ED 227S	Intro to Mid & Sec Students/Sc	3.00	3.00	A	
Req Designation : Indianapolis Community Requirement -- Satisfied					
ED 241	Developmental Theory & App: Ed	3.00	3.00	A	
ED 244	Concepts of Education	3.00	3.00	A	
GE 109	Cultural Geography	3.00	3.00	A-	
GHS 203	Global and Historical Studies	3.00	3.00	A-	
Course Topic(s): Modernizing & Contemp Europe					
PO 151	Intro to Comparative Politics	3.00	3.00	A	

Degree : Certificate of Graduate Studies
 Confer Date : 2016-05-07
 Plan : International Baccalaureate Certificate

----- Test Credits -----

Test Credits Applied Toward UG Education Program

Fall 2010

Course	Description	Attempted	Earned	Grade	Points
GEN 1EL	100-Level Elective	3.00	3.00	T	
GEN 1EL	100-Level Elective	3.00	3.00	T	
HS 1EL	100-Level Elective	6.00	6.00	T	
Test Trans GPA: 0.000 Transfer Totals : 12.00 12.00 0.000					

----- Beginning of Undergraduate Record -----

Fall 2010

Program : UG Education

Course	Description	Attempted	Earned	Grade	Points
ED 112	Intro to Profession of Tchng	2.00	2.00	A	
ED 245	Intro to Computers in Educ	3.00	3.00	A	
FYS 101	First-Year Seminar	3.00	3.00	A	
Course Topic(s): Identity and Culture					
PCA 232-EN	Seeing the World & the Self	3.00	3.00	A	
PWB 166	Intercollegiate Athletics	1.00	1.00	P	
TI 244-PL	Ethics, The Good Life, & Society	3.00	3.00	A-	

Deans List

Spring 2011

Program : UG Education

Course	Description	Attempted	Earned	Grade	Points
AR 210-MA	Statistically Speaking	3.00	3.00	A	
ED 242	Educ Children w/ Special Needs	2.00	2.00	A	
FYS 102	First Year Seminar	3.00	3.00	A	

Spring 2012

Program : UG Education

Course	Description	Attempted	Earned	Grade	Points
AN 280	Sub-Fields in Anthropology	3.00	3.00	A	
Course Topic(s): Intro to Medical Anthropology					
ED 228S	Content Area Lit in Mid-Sec Cu	3.00	3.00	A	
Req Designation : Indianapolis Community Requirement -- Satisfied					
ED 403	Workshop in Education	3.00	3.00	A	
Course Topic(s): Perspectives in Leadership					
GHS 207	Global and Historical Studies	3.00	3.00	A	
Course Topic(s): Resistance & Rights: Women					
PO 201S	Research and Analysis	3.00	3.00	A	
Req Designation : Indianapolis Community Requirement -- Satisfied					
SW 220-COB	The Economy and Society	3.00	3.00	A	

Deans List

Summer I 2012

Program : UG Education

Course	Description	Attempted	Earned	Grade	Points
ED 490	Assmnt of Childrn w Spec Needs	3.00	3.00	A	

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Page No. 2

Name : Burton, Julia Elizabeth

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

ED 491 Behavior Mgt for Incl Classrm 3.00 3.00 A
HST 205 Questions in History 3.00 3.00 A
Course Topic(s): Reel America: Film & Amer Exp

Summer II 2012

Program : UG Education

Course	Description	Attempted	Earned	Grade	Points
ED 243	Methods & Mat: Strat for Teach	3.00	3.00	A	

Fall 2012

Program : UG Education

Course	Description	Attempted	Earned	Grade	Points
ED 398	MultiLing Learner & Their Cult	3.00	3.00	A	
ED 492	Special Education Law	1.00	1.00	A	
GE 310	Historical Geography of US	3.00	3.00	A-	
HST 333	The Early American Republic	3.00	3.00	A	
PO 131	Introduction to US Politics	3.00	3.00	A-	
SW 200-SO	Understanding Society	3.00	3.00	A	

Course Topic(s): Race & Ethnicity-Soc Perspect

Spring 2013

Program : UG Education

Course	Description	Attempted	Earned	Grade	Points
ED 327	Curric & Instr Strat - Middle	3.00	3.00	A	
ED 408	Foundations of Effective Read	3.00	3.00	A	
HST 305	Topics in History	3.00	3.00	A	

Course Topic(s): The World of Abraham Lincoln

HST 347	US Urban History	3.00	3.00	A	
PO 102	Introduction to Peace Studies	3.00	3.00	A-	
SW 250-PS	Psychological Inquiry	3.00	3.00	A	

Deans List

Summer I 2013

Program : UG Education

Course	Description	Attempted	Earned	Grade	Points
ED 498	Methods for Teaching Multiling	3.00	3.00	A	

End Of Transcript

Fall 2013

Program : UG Education

Course	Description	Attempted	Earned	Grade	Points
ED 433	Content Area Methods- High Sch	4.00	4.00	A	

Course Topic(s): Integrated Special Methods

ED 465	Second Lang. Acquis. & Assmt.	3.00	3.00	A	
HST 205	Questions in History	3.00	3.00	A	

Course Topic(s): The Great War, 1914-1918

HST 215	Themes in World History	3.00	3.00	A	
HST 345	History of the American Midwes	3.00	3.00	A	

Deans List

Spring 2014

Program : UG Education

Course	Description	Attempted	Earned	Grade	Points
ED 423	Student Teaching Jr/Mid High	5.00	5.00	PV	
ED 425	Secondary Student Teaching 1	5.00	5.00	PV	
ED 434	Middle Secondary Stud Teach Sem	2.00	2.00	A	

Undergraduate Career Totals

CUM GPA : 3.947 CUM TOTALS : 144.00 156.00 525.070

- - - - Non-Course Milestones - - - -

2014-01-28 - - Butler Cultural Requirements
Milestone Status: Completed
Butler Cultural Requirement

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Page No. 1

Name : Burton, Julia Elizabeth

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Print Date : 2016-11-07

- - - - - Degrees Awarded - - - - -

Degree : Bachelor of Science
Confer Date : 2014-05-10
Degree Honors : Cum Laude
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Plan : Special Education Mild Intervention Minor
Plan : English as a New Language Minor

- - - - -
Degree : Certificate of Graduate Studies
Confer Date : 2016-05-07
Plan : International Baccalaureate Certificate

- - - - - Beginning of Graduate Record - - - - -

Summer II 2015

Program : GR Non Degree Education

<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
ED 503	Concentrated Learning Exper	3.00	3.00	A	
Course Topic(s): Curr Processes in IB Middle					

Fall 2015

Program : GR Non Degree Education

<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
ED 503	Concentrated Learning Exper	3.00	3.00	A	
Course Topic(s): Assess in the IB Middle Years					
ED 503	Concentrated Learning Exper	3.00	3.00	A	
Course Topic(s): Teach & Learn in IB Middle					

Spring 2016

Program : GR Non Degree Education

<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
ED 503	Concentrated Learning Exper	3.00	3.00	A	
Course Topic(s): Prof Learning Global MYP					

Graduate Career Totals

CUM GPA : 4.000 CUM TOTALS : 12.00 12.00 48.000

End Of Transcript

June 04, 2021

The Honorable Elizabeth Hanes
 Spottswood W. Robinson III & Robert R. Merhige,
 Jr., U.S. Courthouse
 701 East Broad Street, 5th Floor
 Richmond, VA 23219

Dear Judge Hanes:

I am delighted to wholeheartedly recommend Julie Leopold for a clerkship in your chambers. Julie is immensely committed to public service, and her integrity and steadfast commitment to justice would be an asset to your chambers. Julie is also a proficient legal researcher and a strong oral and written communicator who seeks out constructive feedback and maintains her impeccable work ethic even though the most difficult circumstances. She will make an excellent law clerk.

I met Julie when she became a student in one of my Research, Reasoning, Writing and Advocacy (RRWA) II classes in January 2020. RRWA provides foundational, practice-oriented instruction which helps students develop the skills necessary to communicate professionally as attorneys. Working both individually and in teams, students learn the fundamentals of legal reasoning, research, writing, and advocacy, primarily by simulating important aspects of law-office work. Over a semester, I reviewed multiple drafts of Julie's trial and appellate briefs, observed her oral arguments, and met with her for six required one-on-one conferences.

Julie is a strong legal writer. Her legal analysis is penetrating and persuasive, and she is comfortable with legal writing conventions across a variety of genres. You can trust her to draft complex documents independently, even in difficult circumstances. For example, RRWA's final assessment required Julie to assimilate a client file, teach herself an entirely new—and messy—area of constitutional law, and draft a motion memorandum essentially on her own. Moreover, in the spring of 2020, this final project was completed while Julie was working remotely, during a global pandemic, and after the law school had moved to a mandatory pass/fail grading system.

Despite these obstacles, Julie's motivation did not waver and she wrote an excellent brief. She opened with a compelling Statement of Facts that ably incorporated record material into the narrative to frame the case favorably for her client. More importantly, her legal analysis was strong and well organized. Within each section, her rule passages were robust and included sophisticated implicit rules and rules she had synthesized from multiple authorities. I could tell that Julie had taken the time to look for patterns across the cases and thought carefully about how to frame those rules fairly but persuasively. And the sections of her memo in which she applied the law to her client's facts were specific, organized to track her rule passages, and convincing.

I have also had the opportunity to read additional pieces of writing that Julie has produced in the last year, including documents she has written for her Judicial Clerkship Writing class and a research paper on hunger in North Carolina. This work demonstrates Julie's continued growth and versatility as a writer.

Julie's legal research skills are similarly strong. In my class, her research on open-universe assignments was thorough and on point. Her performance on our final independent research assessment was strong for a second-semester 1L, finding all of the best authorities to address the fictional scenario. And I know that since she was my student, Julie's classes, commitment to her journal, work as an RA for a professor doing cutting-edge research, and judicial externship have only broadened and deepened her research skills.

Julie is also an effective oral communicator, both in one-on-one settings and in groups. Julie was consistently prepared for her individual conferences with me, and I could always count on her to ask insightful questions in class that displayed meticulous preparation and enriched the discussion for everyone. When it came time for students to deliver their appellate oral arguments, I learned that formal oral advocacy is yet another of Julie's strengths. Even though I knew she was nervous, Julie's appellate oral argument demonstrated a mastery of the factual record and the relevant legal authorities as well as poise and presence at the podium. And I know Julie also connects deeply with her fellow students and the clients she works with in her pro bono work.

Julie is also a consummate professional. She is consistently engaged with any task she is assigned, and asks frequent and insightful questions. Moreover, Julie works hard to develop the skills necessary for legal practice. As a result, she not only graciously accepts, but affirmatively seeks out, constructive feedback on her work. Over the course of the semester, I saw dramatic growth in Julie's writing precisely because of her careful attention to and implementation of such feedback. I remember literally whooping when I de-anonymized Julie's final motion memo because I was delighted to see how much she had learned as a result of her hard work.

Rachel Gurvich - gurvich@email.unc.edu

Interpersonally, Julie is delightful. She strikes up an easy rapport with peers and professors alike. Finally, she is an effective leader who leads without a trace of ego. This was apparent in the group work I saw her do in RRWA, but her election as the Executive Comments Editor of the North Carolina Civil Rights Law Review and, even more impressively, as the Director of UNC's large and thriving pro bono program—to which she has been dedicated since her first day of law school—shows that her peers recognize these skills in her, too.

In short, I am certain that Julie would be a wonderful addition to your chambers. I would be happy to answer any questions you may have about Julie. I may be reached at (617) 640-9764 or gurvich@email.unc.edu.

Best regards,

Rachel Gurvich

Rachel Gurvich - gurvich@email.unc.edu

June 04, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I have the pleasure of writing to you to recommend Julie Leopold for a clerkship with you. It's a pleasure because Julie is so eminently qualified and so easy to rave about! She is mature, smart, conscientious, and tremendously personable. I am certain she would make an outstanding addition to your chambers.

I've known Julie for over a year now. As a first-year, she was a student in my Constitutional Law class in the spring semester of 2020. Despite the challenges of the pandemic, she and I have remained in close contact since that time. I've conferred with her about a number of matters, some of them related to the law and others to her career. I believe I know her well and am in a good position to assess her as a clerkship applicant.

Julie distinguished herself in Constitutional Law as a thoughtful, focused student. I could always count on her not just to be well-prepared for class, but to have thought the reading through deeply and to have taken the opportunity, on her own, to try to connect any particular day's reading to the course's broader themes. She was a frequent volunteer in classroom discussions – not just when we were in-person the first half of the semester, but also when we were driven to remote classes on Zoom the second half of the semester. She asked probing questions that pressed beneath the surface of the cases, trying to understand what really made each Justice's approach tick. While circumstances forced the law school to shift to mandatory pass-fail grading for the semester, she wrote an excellent exam and would no doubt have received an A or A- grade had I assigned them.

Another thing that stood out about Julie was that I was able to turn to her a couple of times as a resource about teaching. Before coming to law school she was a public school teacher. As I recall, the subjects she taught included history and social studies. This naturally gave her a bit more insight into the history of constitutional law than the average law student, and enabled us to have several conversations about not just the "what" but the "how" of teaching the subject matter. I consulted with her a couple of times about the transition we had to make from in-person to remote instruction, getting valuable feedback.

It has been such a pleasure to watch Julie blossom as a law student over the past year. In very challenging circumstances due to the isolation of the pandemic, she has managed to accomplish more than many students do in ordinary circumstances! For example, she has externed in the chambers of US Magistrate Judge Joe Webster here in the Middle District of North Carolina, doing valuable research and drafting work for the judge and his clerks. She has also provided valuable research assistance to one of Carolina's most prolific, high-profile scholars, Professor Erika Wilson.

Most noteworthy, I think, is her focus on garnering experience in administrative agencies. Julie believes strongly that government work is the right path for her, and she has effectively pursued positions both in the Environmental Division of the NC Department of Justice and, for the summer of 2021, in the Office of the Solicitor of the US Department of Labor. I think this reflects Julie's maturity quite well: she is able to perceive what many law students do not appreciate, which is the real impact that agency work can have. And she is organized and focused enough to seek out these sorts of positions and then land them.

It's impossible to write about Julie without also noting her commitment to pro bono service. She launched herself into pro bono work literally upon walking in the door at the law school as a first-year student in 2019, and has continued ever since, including through the pandemic, doing important work in several areas with a special focus on the rights of children. Not surprisingly, her hard work and maturity have been rewarded; she was recently named Director of the entire Pro Bono Program here at the law school.

I'd be remiss in not mentioning Julie's personal qualities. She has a calm, even-keeled presence and a warm, open "midwestern" style (betokening her Indiana upbringing). She smiles readily and puts people at ease. I am certain she would work beautifully with you, other law clerks, secretaries, and anyone else in the courthouse with whom she comes in contact.

Julie's fantastic. I couldn't commend her to you more confidently, and hope you'll give her materials very serious consideration. Please be in touch if you have any followup questions.

Sincerely,
Eric L. Muller

Eric Muller - emuller@email.unc.edu - 919.962.7067

Dan K. Moore Distinguished Professor in Jurisprudence and Ethics

Eric Muller - emuller@email.unc.edu - 919.962.7067

United States District Court
Middle District of North Carolina
Post Office Box 1091
Durham North Carolina 27702

Chambers of
Joe L. Webster
United States Magistrate Judge

Telephone: 919-425-8900
Fax: 919-425-8910

May 17, 2021

To Whom It May Concern:

I am writing to recommend Julia Leopold for a clerkship opportunity in your chambers. Julie recently interned in my chambers during the 2021 spring semester while a student at the University of North Carolina – Chapel Hill School of Law.

While in my chambers, and under my supervision, Julie regularly assisted me in several assignments, including researching specific legal issues, preparing recommendations regarding the disposition of motions in social security appeals and other civil matters, and editing memoranda. On several occasions, Julie was able to take extensive factual allegations from a complaint and draft well-reasoned memos summarizing the case. She is a thorough researcher and an exceptionally hard worker.

Additionally, some of Julie's greatest strengths are her pleasant demeanor and her ability to work well with staff, follow directions carefully, and accept constructive criticism regarding her analytical skills. Julie consistently demonstrated great flexibility and was able to work simultaneously on various assignments. She always asked questions and was eager to learn.

In sum, I firmly believe that Julie has the intellectual capacity, the drive, and the skill to be a successful law clerk. Should you have any questions please do not hesitate to contact me.

Sincerely,



Joe L. Webster
United States Magistrate Judge

Julie B. Leopold

jleopold@live.unc.edu | 317.918.4630

I wrote this North Carolina Court of Appeals Opinion in my Writing for Judicial Clerkships course (Spring 2021). It was “open universe” and based on the facts and docket of a real case. It was completely drafted by myself with minor revisions based on my professor’s feedback during the assignment.

ROBERT E. HOVEY
and wife, **TANYA L. HOVEY**, Plaintiffs-Appellees,

v.

SAND DOLLAR SHORES
HOMEOWNER’S ASSOCIATION, INC., and the TOWN OF DUCK, Defendants-
Appellants.

No. COA20-423

10 Feb. 2020 calendar

In this case we consider a lower court’s finding that a public dedication of a pedestrian beach access has taken place. The landowner appeals on the grounds that the necessary elements of public dedication, offer and acceptance, have not been met. We find that neither the element was met by the Plaintiff-Appellees. We therefore reverse and remand.

I. BACKGROUND

After being arrested for trespassing while using a pedestrian beach access in 2019, Robert E. Hovey, and his wife Tanya L. Hovey (“the Hoveys”) filed the complaint

leading to this appeal seeking a declaratory judgment that the pedestrian beach access had been dedicated to the public. (AeeBR10; AantBR7)

The following facts have been agreed to by both parties. When the Sand Dollar Shores neighborhood was first built in 1981, the developer recorded both a plat map as well as two sets of restrictive covenants for the neighborhood. (AantBR5-6) Plaintiff's Exhibit B, the Sand Dollar Shores Plat, shows forty-two residential lots, four of which were ocean front; a sixty-foot right of way labeled "SEABREEZE DRIVE" bisecting the thirty-eight interior lots; a "20' EMERGENCY VEHICLE EASEMENT" where Seabreeze Drive forms a cul-de-sac before the ocean front properties; and an "8' PEDESTRIAN BEACH ACCESS EASEMENT" running from Seabreeze Drive, between the two middle ocean front properties, to the ocean. (R13) The plat specifically noted, and the cover page confirmed in a "CERTIFICATE OF OWNERSHIP AND DEDICATION," that all "streets and roads" in the neighborhood were to be dedicated to the public. (AantBR6; AeeBR4) However, these documents made no similar notation about the "8' PEDESTRIAN BEACH ACCESS EASEMENT" being dedicated to the public. (AantBR6; AeeBR4) Instead, the restrictive covenants, recorded two days later, stated that the beach access easement was available "for use *only* by the owners of Sand Dollars Shores and their guests; use by anyone else is *prohibited* and may result in a prosecution for trespassing." (AantBR6)(cleaned up and emphasis added)

In 1990, the developer created the Sand Dollar Shores Homeowner's Association ("the HOA"), Defendant-Appellants in the present case. (AantBR6) The

easements, including the beach access, and the restrictive covenants were deeded to the HOA at the time of its creation. (AantBR6) Since that time, the HOA has been the sole caretaker of this access paying thousands of dollars for maintenance and hanging “No Trespassing” signs. (AantBR6, R109-111)

This pedestrian beach access in question provides the most convenient and direct access for the Hoveys to the beach. (AantBR7) In 1996, the Hoveys opened a beach equipment rental business in the Town of Duck (“the Town”) and began using this pedestrian beach access to conduct their business. (AeeBR8) Four years later, the Hoveys bought a house across the highway to be used as a rental home for vacationing tourists in the summer – these tourists also used the same pedestrian access to reach the beach. (AeeBR8)

After the HOA sent a letter to the Hoveys demanding that they stop using the beach access in 2016, the Hoveys filed a lawsuit against the Town, into which the neighborhood has since become incorporated, and the HOA seeking a declaratory judgment of their right to use the beach access. (AeeBR9) The Hoveys’s motion for summary judgement in the 2016 lawsuit was denied. (AeeBR9) The 2016 complaint was then dropped when the Town stated that they had “no intention of arresting [the Hoveys] for use of any of the accesses absent of a Court decision settling any civil disputes arising between the Plaintiffs and the owners of the accesses.” (AeeBR9)

Following Mr. Hovey’s arrest for trespassing in 2019, the Hoveys brought the present complaint against the HOA and the Town, again seeking declaratory judgment for the right to use the beach access. (AeeBR10) The Town was named in

the action below as a solely nominal party so that the Town would be subject to any final judgement. (R86) The trial court ordered summary judgment in favor of the Hoveys granting a declaratory judgment for the public use of the beach access. (R223-24) This appeal is now before the court.

II. DISCUSSION

A motion for summary judgment is granted when there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c). We review a trial court's order of summary judgment *de novo*, under which this court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 342 (2009). Here, because the parties have stipulated to the facts of this case, we need only apply the law again.

Despite being the Appellees, the Hoveys have a heavy burden to succeed.¹ Public dedication is an "exceptional and peculiar mode of passing title" and, when improperly ordered by judgement, essentially constitutes a government taking of land; the presumption is therefore against granting a dedication. *State Highway Comm'n v. Thornton*, 271 N.C. 227, 233 (1967) (noting "the courts will not lightly declare a dedication to public use"). Indeed, in cases seeking a declaratory judgment for a public dedication, the burden rests on the plaintiff, *Town of Lumberton v. Branch*, 180 N.C. 249, 250 (1920), and on appeal the burden of proof remains on the party who shouldered the burden at the lower court. *Ocean Hill Joint Venture v.*

¹ As a preliminary matter and because the Appellees raised the issue in their brief, the Court notes that Appellees have standing as a result of special damages they allege to have suffered.

Currituck Cnty., 178 N.C. App. 182, 187 (2006). Finally, in this particular case, the fact that the plaintiff made the motion for summary judgment makes that burden even heavier. See *Blackwell v. Massey*, 69 N.C. App. 240, 243 (1984) (holding that “rarely is it proper to enter summary judgement in favor of the party having the burden of proof”).

Here, in order to defeat this heavy presumption, the appellees need to show that the land was dedicated to the Town for use by the public. In North Carolina, a public dedication requires the common law principles of offer by the landowner and acceptance on the part of the public.² *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 631 (2009).

A. The Developer Did Not Offer the Pedestrian Beach Access Easement to the Public.

The offer of dedication may be in express terms or it may be implied from the conduct on the part of the owner. *Metcalf*, 200 N.C. App. at 631. Regardless of if the dedication was made in writing or through conduct, “it is the owner’s intent to dedicate that is essential.” *Town of Highlands v. Edwards*, 144 N.C. App. 363, 367 (2001). The trial court erred by upholding the Appellees’ argument that intent does not matter. This Court has previously held “[t]he evidence in support of the intent of an owner to dedicate an easement should be clear and unmistakable.” *Wright v. Town of Matthews*, 177 N.C. App. 1, 11 (1953). Further, in order to show that a dedication occurred, the Appellees must show an intent, either express or an implied, to dedicate

² Here, the Court notes that, while the Appellees argue otherwise, applying state common law is appropriate in this case. *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 631 (2009) (citing *Tower Dev. Partners v. Zell*, 120 N.C. App. 136, 140 (1995)).

the property for public use. *Nicholas v. Salisbury Hardware & Furniture Co.*, 248 N.C. 462, 469 (1958).

i. The developer never expressly dedicated the beach access to the public.

Express dedication can take place with a variety of recorded documents including a deed, reference to a plat map, or a contract. *Milliken v. Denny*, 141 N.C. 224, 226 (1906); *Wright*, 177 N.C. App. at 11-12; *Metcalf*, 200 N.C. App. at 632. Regardless of which document is used, the intent to dedicate must be “unequivocal and without ambiguity.” *Milliken*, 141 N.C. at 226. A simple description of the property or depiction on a plat is not sufficient to show a clear expression of the intent to dedicate. *Harry v. Crescent Res., Inc.*, 136 N.C. App. 71, 80 (1999). Instead the recorded instrument must clearly indicate “that the private parties involved intended to dedicate [the property] for public use.” *Town of Carrboro v. Slack*, 261 N.C. App. 525, 532 (2018).

Here, the Appellees are unable to produce such an express instrument. The Appellees claim that certificates from the developer show that the developer intended to dedicate this pedestrian beach access to the public. (AeeBr10) However, the “CERTIFICATE OF OWNERSHIP AND DEDICATION” from the developer only includes “all roads, alleys, walks, parks, and other sites to public or private use as noted.” (AeeBr4) Even if the Court considered “other sites to public or private use as noted” clear enough to meet the necessary standard, the pedestrian beach access was never shown as “for public purposes” on the plat. (R13) Because of the requirement that the language be “unequivocal and without ambiguity,” as well as the

presumption against public dedication and the heavy burden on the Appellees, this claim must fail.

ii. The developer's conduct demonstrates no intent to dedicate the beach access to the public.

An offer for dedication can also be implied by the landowner's conduct. When dedication is implied, the landowner's intent must be clear. *Wright*, 177 N.C. App at 14. (noting "where no actual intent to dedicate is shown, the manifestation of implied intent to dedicate must clearly appear by acts which to a reasonable person would appear inconsistent and irreconcilable with any construction except dedication of the property to public use"). Acts that are "inconsistent with dedication" show that a landowner did not intend to dedicate their property to the public. *See Kraft v. Town of Mt. Olive*, 183 N.C. App. 415, 420 (2007); *see also Nicholas*, 248 N.C. at 462. Previous courts have considered acts such as paying property taxes, affirmative acts respecting the property, and not permissively allowing public use of the land to be acts inconsistent with an intent to dedicate land for public use. *See Wright*, 177 N.C. App. at 14; *see also Kraft*, 183 N.C. App. at 420; *see also Nicholas*, 248 N.C. at 471.

Here, the Appellants cite, and the Record reveals, numerous acts on the part of the developer, and later the HOA, that are inconsistent with a public dedication of this beach access easement. (AantBR19; R107-09 ¶¶ 5, 6, 10-14) First, and most notably, two days after recording the plat, the developer recorded a restrictive covenant affirmatively restricting the use of the beach access easement to lot owners and their guests which read:

The eight foot (8') access from the subdivision road, Seabreeze Drive to the ocean as shown between Lots 2 and 3 of Sand Dollar Shores, Inc. plat, is hereby restricted to, reserved for and made available for use of Sand Dollar Shores, Inc. lot owners only and their guests Use of this access to the ocean from and over the subdivision property of Sand Dollar Shores, Inc. by the public or anyone else other than Sand Dollar Shores, Inc. lot owners or their guests, is prohibited. Any person violating this Restriction and Covenant may be prosecuted for trespassing, on Sand Dollar Shores, Inc. property.

(Aant18; R145) Further, along with these covenants, the HOA has not permitted the public to use this access by hanging a “No Trespassing/Private Property” sign and taking legal action against members of the public who use the access. (R109 ¶ 14; R197-98) Finally, it is worth noting that the HOA has spent a significant amount of money on maintaining this walkway and it would be against the economic interests of the HOA to make such a financial investment only to later make the pedestrian beach access available to the public. (R110-11)

Not only did the developer not expressly intend to dedicate this land to the public, but they took actions which would be inconsistent with such an intent to dedicate. For the above reasons, this court concludes that the developer did not dedicate the pedestrian beach access.

B. The Town of Duck Did Not Accept the Pedestrian Beach Access Easement.

Notwithstanding the issue of offer, the Appellees must also show acceptance on the part of the Town.³ In order for a dedication to occur on behalf of the public, a

³ Here, the Court notes that although the Town is named in the lawsuit, the Town of Duck was not incorporated until 2000 and prior to that Dare County was the public entity responsible for accepting a dedication. For this reason and for clarity's sake, this analysis will refer to both Dare County and the Town of Duck as “the Town.”

proper public authority must accept in some recognized legal manner. *See Kraft*, 183 N.C. App. at 420. This acceptance may either be express or implied. *Id.*; *see also Metcalf*, 200 N.C. App. at 631. Here, the Town made no express or implied acceptance of the pedestrian beach access.

Express acceptance is completed by a formal ratification, resolution, order, adoption of an ordinance, council's vote of approval or the signing of a written instrument by proper authorities. *Metcalf*, 200 N.C. App. at 631 (citing *Kraft*, 183 N.C. App. at 420-21). Although the Appellees cite to the Plaintiff's Exhibit B, the Sand Dollar Shores Plat as evidence of the Town's express acceptance, nowhere in this document does it state that the pedestrian beach access easement in question was accepted by the Town. (R12-3) Since that time, no government agency, neither the Country nor the Town, has made a formal claim of ownership or legal right over the pedestrian beach access. (R108¶9)

Acceptance by the public can also be implied when the property is used by the general public and the public authorities have controlled the property. *Kraft*, 183 N.C. App. at 420. Since the creation of this pedestrian beach access the Town has ever assumed maintenance responsibility for it, nor monitored the beach access, nor enforced the "No Trespassing" signs. (R108¶8; R72; R75 ¶¶ 25-29) An implied acceptance cannot be found here because the public authorities have never controlled the property.

Finally, the Appellee is correct in stating that the Town did accept the roads, streets and other easements shown on the plat map as having a public purpose.

(AeeBR5; R12-3) However, the Town accepted *only* the roads, streets, and other easements on the plat map shown to have a public purpose. The public dedication of these pieces of property has no relation to the pedestrian beach access except to distinguish from the actions of the Town related to the beach access which do not constitute either an express or implied acceptance.

III. CONCLUSION

For the reasons stated above, this Court does hereby REVERSE and REMAND the trial court's decision granting summary judgment in favor of the Appellees for a finding not inconsistent with this opinion.

Applicant Details

First Name **Charlotte**
 Last Name **Leszinske**
 Citizenship Status **U. S. Citizen**
 Email Address leszinske2020@lawnet.ucla.edu
 Address

Address
Street
945 Weyburn Ter
City
Los Angeles
State/Territory
California
Zip
90024
Country
United States

Contact Phone Number **9168369919**

Applicant Education

BA/BS From **New York University**
 Date of BA/BS **May 2017**
 JD/LLB From **University of California at Los Angeles (UCLA) Law School**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011
 Date of JD/LLB **May 15, 2020**
 Class Rank **I am not ranked**
 Does the law school have a Law Review/Journal? **Yes**
 Law Review/Journal **No**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Moot Court Honors Society**
Vis Moot Organization, Founder and Co-President

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Peake, Jessica
peake@law.ucla.edu
2152032060
Raustiala, Kal
raustiala@law.ucla.edu
Bryant, Taimie
Bryant@law.ucla.edu
(310) 206-3763

References

All references prefer to be contacted by email.

Hon. Lisa Hall Johnson
lisa.hall.johnson@mdcourts.gov

Hon. Katina S. Steuart
katina.steuart@mdcourts.gov

Erica Delvalle
erica.delvalle@mdcourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

CHARLOTTE LESZINSKE

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(916) 836-9919 | leszinske@gmail.com

The Honorable Elizabeth W. Hanes
Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 E Broad St
Richmond, VA 23219

Dear Judge Hanes,

I am a current law clerk and recent graduate of UCLA School of Law who is writing to express my interest in a judicial clerkship in your chambers beginning in August 2022. In your chambers, I hope to use my research and communication skills to help you consider and resolve cases while serving the public and expanding my knowledge of different areas of the law.

I believe that my significant experience working for the judiciary will make me useful to your chambers. I am currently a law clerk at the District Court of Prince George's County, where I prepare memoranda and other work product for consideration by the bench. I also facilitate hearings and communicate with parties before the court. Before clerking, I externed for two additional judges, including the Honorable Karen E. Scott at the Central District of California. In addition to my judicial experience, I have considerable research and writing skills. In law school, I served as a faculty research assistant researching and editing articles for publication. And as a member of the Moot Court Honors Board and founder of UCLA Law's Vis Moot Organization, I wrote and defended legal arguments before a diverse array of tribunals. Finally, I am a self-starter, extremely organized, and capable of keeping up with fast-paced deadlines. As Co-Founder and Co-Captain of UCLA's Vis Moot Court team, I led a team of seven students in writing two briefs and competing in pairs at multiple competitions.

Thank you so much for your time and consideration. Please find enclosed my resume, transcript, writing sample, and letters of recommendation. I would be happy to provide any additional information which may shed light on my candidacy.

Best regards,

Charlotte E. Leszinske

CHARLOTTE LESZINSKE

100 Luna Park Dr #360, Alexandria VA 22305
(916) 836 9919 | leszinskec@gmail.com

BAR ADMISSIONS

Pending: New York, District of Columbia, Maryland, Texas

EDUCATION

UCLA School of Law | Los Angeles, CA

Juris Doctor, May 2020

GPA: 3.55 (Cumulative), 4.0 (Spring 2020)

Moot Court: Vis Moot Organization, *Founder and Co-President* 2019-20, *Participant* 2018-19
UCLA Law Moot Court, *Honors Society Member* 2019-20, *Participant* 2018-19

New York University | New York, NY

Bachelor of Arts, Global Liberal Studies, May 2017

GPA: 3.59

Honors: University Honors Scholar, Dean's Thesis Grant, Dean's Research Grant

Study Abroad: New York University Paris, 2015-16, 2013-14

PROFESSIONAL EXPERIENCE

District Court for Prince George's County | Upper Marlboro, MD September 2020 –

Clerk to the Honorable Lisa Hall Johnson

Research and write memoranda. Evaluate requests for affidavit judgements and expungements.

Facilitate compliance with court procedures. Communicate with attorneys before the court.

UCLA School of Law | Los Angeles, CA

August 2019 – May 2020

Research Assistant to Professor Kal Raustiala

Wrote memoranda, bibliographies, and other documents. Edited faculty articles for submission.

Conkle, Kremer & Engel | Santa Monica, CA

June 2019 – August 2019

Summer Associate

Wrote portions of briefs, administrative responses, contracts, and memoranda. Drafted, edited, and evaluated contracts. Advised clients about regulatory compliance.

California Second District Court of Appeals | Los Angeles, CA August 2018 – December 2018

Judicial Extern to the Honorable Judith Ashmann-Gerst

Drafted opinions and memoranda for cases before the court.

U.S. District Court, Central District of California | Santa Ana, CA

May 2018 – July 2018

Judicial Extern to the Honorable Karen E. Scott

Drafted Report and Recommendations and memoranda for cases before the court.

Cabinet Castellane | Paris, France

February 2016 – April 2016

Legal Intern

Drafted merit awards, correspondence, and other legal documents in English and French.

LANGUAGES & INTERESTS

English (Native), French (Upper Immediate)

Travel, live music, Mediterranean food

Student Copy / Personal Use Only | [805054833] [LESZINSKE, CHARLOTTE]

University of California, Los Angeles
LAW Student Copy Transcript Report

For Personal Use Only

This is an **unofficial/student copy** of an academic transcript and therefore does not contain the university seal and Registrar's signature. Students who attempt to alter or tamper with this document will be subject to disciplinary action, including possible dismissal, and prosecution permissible by law.

Student Information

Name: LESZINSKE, CHARLOTTE ELIZABETH
UCLA ID: 805054833
Date of Birth: 03/08/XXXX
Version: 08/2014 | SAITONE
Generation Date: November 08, 2020 | 11:49:11 AM
This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/21/2017
SCHOOL OF LAW
Major:
LAW

Degrees | Certificates Awarded

JURIS DOCTOR Awarded May 14, 2020
in LAW

Previous Degrees

None Reported

California Residence Status

Resident

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Fall Semester 2017

Major:
LAW

INTRO LEGL ANALYSIS	LAW 101	1.0	0.0	P	
LGL RSRCH & WRITING	LAW 108A	2.0	0.0	IP	
Multiple Term - In Progress					
PROPERTY	LAW 130	4.0	13.2	B+	
TORTS	LAW 140	4.0	16.0	A	
CIVIL PROCEDURE	LAW 145	4.0	12.0	B	
LAWYR-CLIENT RELATN	LAW 155	1.0	0.0	P	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total		14.0	14.0	41.2	3.433

Spring Semester 2018

CONTRACTS	LAW 100	4.0	13.2	B+	
LGL RSRCH & WRITING	LAW 108B	5.0	15.0	B	
End of Multiple Term Course					
CRIMINAL LAW	LAW 120	4.0	10.8	B-	
CONSTITUT LAW I	LAW 148	4.0	14.8	A-	
SOCIAL SCIENCE	LAW 165	1.0	0.0	P	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
	Term Total	18.0	18.0	53.8	3.165

Fall Semester 2018

EVIDENCE	LAW 211	4.0	14.8	A-	
ADMINISTRATIVE LAW	LAW 216	4.0	13.2	B+	
PROFESSIONAL RESPON	LAW 312	2.0	6.6	B+	
STATE APPELLATE	LAW 781	4.0	0.0	P	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total		14.0	14.0	34.6	3.460

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Spring Semester 2019

CONSTITUTIONAL LAW II	LAW 201	4.0	13.2	B+	
INDIVIDUAL PROJECT	LAW 345	3.0	11.1	A-	
FRGN RELATIONS LAW	LAW 583	3.0	12.0	A	
PRACTICUM FOR 841	LAW 810	1.0	0.0	P	
ELDER LAW PRACTICE	LAW 841	3.0	12.0	A	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total		14.0	14.0	48.3	3.715

Fall Semester 2019

BUSINESS ASSOCIATNS	LAW 230	4.0	0.0	P	
IMMIGRATION LAW	LAW 331	4.0	14.8	A-	
INDIVIDUAL PROJECT	LAW 345	2.0	8.0	A	
EXECUTIVE POWER	LAW 644	3.0	12.0	A	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
	Term Total	13.0	13.0	34.8	3.867

Spring Semester 2020

CONSTITUTIONAL CRIM PRO	LAW 202	4.0	0.0	P
INDIVIDUAL PROJECT	LAW 345	2.0	8.0	A
TOPICS: CRIMINAL LAW	LAW 503	3.0	12.0	A
DOG ADJUDICATION CLIN	LAW 778	4.0	16.0	A
INTENSIVE EDITING	LAW 906	1.0	0.0	P

SPRING 2020: DUE TO COVID-19, THE SCHOOL ADOPTED MANDATORY P/U/NC GRADING WITH EXCEPTIONS FOR CERTAIN CATEGORIES OF CLASSES AND STUDENTS.

	<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total	14.0	14.0	36.0	4.000

LAW Totals

	<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Pass/Unsatisfactory Total	17.0	17.0	N/a	N/a
Graded Total	70.0	70.0	N/a	N/a
Cumulative Total	87.0	87.0	248.7	3.553

Total Completed Units 87.0

END OF RECORD
NO ENTRIES BELOW THIS LINE

Charlotte Leszinske
New York University
Cumulative GPA: 3.59

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Cultural Foundations I	Christopher Packard	A-	4.0	
Global Orientations	Faculty	P	0.0	Rotating lecture series.
Intensive Intermediate French	Isabelle Coydon	B+	6.0	
Social Foundations I	Romi Mukherjee	A-	4.0	
Writing I	Christopher Packard	A-	4.0	

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Conversation/Composition	Nadine Airout	B	4.0	
Cultural Foundations II	Marina Davies	B	4.0	
Social Foundations II	Romi Mukherjee	B+	4.0	
Writing II	Christopher Packard	A	4.0	

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Writing Studio	Elayne Tobin	A-		Could not find name of professor.
Elementary Chinese I	Jun Yin	B-		
Origins of Astronomy	Engelbert Schucking	P		
Piano for Non-Majors	Tina DiMonda	B		
Written Contemporary French	Anna-Caroline Prost	B-		

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Approaches: Sophomore Seminar	James McBride	A	4.0	
Global Topics: Sophomore Seminar	Ascension Mejorado	A	4.0	
Life Science	Nicholas	A-	4.0	
World War II	N/a	A	4.0	Unable to find name of professor.

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Composition	Elizabeth Molkou	A-	4.0	
Experiential Learning I	Anna Lesne	A	4.0	

Topics	Mansouria Mokhefi	B	4.0
Topics in Lit	Elizabeth Molkou	A-	4.0

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Between Fiction and Reality	Sophie Body-Gendrot	A-	4.0	
Experiential Learning II	Anna Lesne	P	2.0	
Independent Studies	Robert Squillace	A	2.0	
Junior Seminar	Peter Valenti	A-	2.0	
Strategic Studies	Ronald Hatto	A	2.0	

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
MA Proseminar	Zvi Ben-Dor	A	4.0	
Senior Colloquium I	Peter Valenti	A	4.0	
Senior Seminar	James McBride	A	4.0	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Senior Seminar	Jessamyn Hatcher	A-	4.0	
Senior Thesis	Peter Valenti	A	6.0	
Topics in Irish History	Marion Casey	B-	4.0	

Grading System Description

Graded on a 4.0 scale.

CHARLOTTE LESZINSKE

100 Luna Park Dr #360, Alexandria VA 22305
(916) 836 9919 | leszinske@gmail.com

REFERENCES

1. **The Honorable Lisa Hall Johnson**
lisa.hall.johnson@mdcourts.gov
Judge Hall Johnson is the District Administrative Judge at the District Court of Prince George's County.
2. **The Honorable Katina S. Steuart**
katina.steuart@mdcourts.gov
Judge Steuart is an Associate Judge at the District Court of Prince George's County.
3. **Erica Delvalle**
erica.delvalle@mdcourts.gov
Ms. Delvalle is the Lead Law Clerk at the District Court of Prince George's County.



JESSICA PEAKE
DIRECTOR, INTERNATIONAL AND COMPARATIVE LAW PROGRAM
ASSISTANT DIRECTOR, THE PROMISE INSTITUTE FOR HUMAN RIGHTS

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-8974
Email: peake@law.ucla.edu

February 7, 2020

Re: Letter of Recommendation in Support of Charlotte Leszinske's Clerkship Application

Dear Selection Committee:

I am delighted to write a recommendation for Charlotte Leszinske, a current 3L student at UCLA School of Law. I am the Director of the International and Comparative Law Program at UCLA Law and the Assistant Director of the Promise Institute for Human Rights. I teach international humanitarian law, and I am also the primary academic advisor for students interested in pursuing a specialized certificate in international and comparative law. In addition, I coach UCLA Law's international law related moot court teams and supervise a number of student organizations, journals and projects. I have had the pleasure of getting to know Charlotte very well during her time at UCLA Law thanks to her participation in the Willem C. Vis International Commercial Arbitration Moot.

Charlotte was selected via competitive application to represent UCLA School of Law at the Vis Moot in Vienna, Austria, in the 2018-19 academic year. The Vis Moot is the world's leading commercial arbitration moot court competition, attracting students from more than 300 law schools around the world. The goal of the competition is to foster the study of international commercial law and arbitration for resolution of international business disputes through its application to a concrete problem of a client and to train law leaders of tomorrow in methods of alternative dispute resolution. Charlotte dedicated herself to developing expertise in international commercial arbitration during the months-long preparation. She was always very prepared for our meetings, and asked thoughtful and insightful questions about complex areas of law. Charlotte showed herself to be a great team player as the team worked together to draft extensive claimant and respondent briefs, and to prepare their oral arguments. She was extremely supportive of her teammates and worked to ensure that the team developed strategies for success at the competition, while at the same time developing her own analytical and lawyering skills.

This academic year, Charlotte has displayed strong leadership skills as she conceptualized and founded the student-run Vis International Moot Organization, of which she is now Co-President. Charlotte and her moot partner launched this organization upon their return from the Vis competition in April 2019, after recognizing the utility of having a student organization to support the competition team, to build up institutional memory about the competition, to streamline research and drafting processes, and to enable more UCLA Law students to be exposed to international commercial arbitration. Charlotte has worked tirelessly with the UCLA administration to get the organization off the ground; she developed an organizational structure, charter, and policy documents, and has engaged in successful fundraising with law firms to fund the team's competition travel. She also recruited the team for this year, and is overseeing all of their preparation. Charlotte has been remarkably successful in these

February 7, 2020

Page 2

endeavors over the past few months, and she is creating a lasting legacy at UCLA, which will serve future students well as they participate in the competition.

Given Charlotte's extensive skill set and experience, I have no hesitation in highly recommending her for a Clerkship. She is incredibly organized, very bright, and thorough in her approach to everything, and would be an asset to any Judge.

If I can be of further assistance to your consideration of Charlotte's application, please do not hesitate to contact me. I can be reached at peake@law.ucla.edu or 310-206-8974.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Peake". The signature is fluid and cursive, with the first letter "J" being large and stylized.

Jessica Peake
Director, International and Comparative Law Program
Assistant Director, the Promise Institute for Human Rights

UCLA School of Law

KAL RAUSTIALA

Promise Institute Professor of Comparative and International Law
UCLA School of Law

Professor, UCLA International Institute
Director, Ronald W. Burkle Center for International Relations

SCHOOL OF LAW

BOX 951476

LOS ANGELES, CALIFORNIA 90095-1476

Phone: (310) 794-4856

Email: raustiala@law.ucla.edu

June 22, 2020

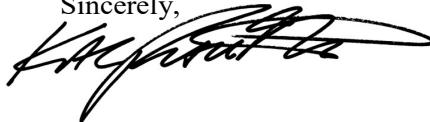
Dear Judge:

I write to recommend Charlotte Leszinske, UCLA 2020, for a clerkship in your chambers. Charlotte worked as my research assistant in the 2019-2020 academic year. Let me first say Charlotte was a successful student at UCLA Law School who was active in our international moot court programs and, in particular, helped organize a new moot court organization at UCLA for the leading international commercial arbitration competition. Our International and Comparative Law Program director called her “a force of nature” for her work on the moot program. And while I did not have Charlotte in class, her record and GPA speaks for itself.

As my research assistant Charlotte was diligent and well-organized. She worked on a number of disparate projects for me, all with success, ranging from blue-booking and cite checking academic articles in various stages of completion to doing original research in French for a project on intellectual property and cultural appropriation claims in the global luxury goods market. For my book (in progress) on the late Nobel Laureate and United Nations official Ralph Bunche, she explored Bunche’s extensive civil rights activism as well as how his mediation techniques were deployed in local criminal gang contexts. Charlotte was very adaptable, easily toggling from intellectual property to international law research, and easy to work with.

Clerking and acting as a research assistant are different tasks, but they share a common core in research and writing. Based on my positive experience with her, I believe Charlotte will be a strong clerk in your chambers and I recommend her highly. Please do not hesitate to follow up if you have any further questions.

Sincerely,



Kal Raustiala



TAIMIE L. BRYANT
PROFESSOR OF LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-3763
Email: bryant@law.ucla.edu

February 11, 2020

Dear Judge:

Charlotte Leszinske asked me to write a letter in support of her clerkship application. I am very happy to do so because I know Charlotte to be a very capable, intelligent, self-motivated, and mature person. I have known Charlotte since her first year when she took my small section Property class. In her second year, she took an elder law course, which I taught as a simulation course to teach the skills of interviewing clients about a legal problem, developing alternative legal strategies, and then counseling clients about their options. This year Charlotte is enrolled in the UCLA Dog Administrative Hearings Clinic, which I direct. Following training sufficient to be appointed as hearing examiners for the City of Los Angeles Department of Animal Services, students conduct hearings concerning potentially dangerous dog complaints. The students review documentary evidence, take in oral testimony, evaluate all evidence in relation to statutory factors, and write a report to the General Manager, including recommendations for disposition of complaints. Charlotte has excelled in all of these courses.

Charlotte's work in the first year Property class revealed her sophisticated reasoning process and creative orientation to lawyering. The grade for this course is based solely on the final exam. Charlotte's final exam score was B+, which is a good grade in the UCLA Law curve. However, in addition to the final exam, small section students are required to produce two ungraded writing assignments. Charlotte's work was very good on those ungraded assignments. The first assignment she wrote concerned applying a case we had studied in class to completely different facts, in order to give the students ideas about the meaning and uses of "precedent." Charlotte avoided the common approach of relying on one understanding of the case and then applying it to the new facts so that the student's understanding of the case is not disturbed. She saw right away that using cases as precedents in new situations is actually quite challenging. For the second written assignment, Charlotte was required to draft a conveyance using either estates in land and future interests or covenants language. This is where Charlotte's complex reasoning and creativity took over to a greater extent than was helpful to her end product. She did recognize that, even with the intense drafting she did, she could not meet all of the client's expectations and that she had created something that would be difficult to explain to the client. By the time of her participation in the elder law client interviewing and legal counseling course, she had corrected for excessive elaboration and worked skillfully with the client during the simulation exercises in that course.

In the elder law simulation course, Charlotte was assigned an actor-client who was scripted to present a challenging legal problem involving delayed return of her buy-in payment to a continuing care retirement community and whether it constituted financial abuse of an elder under a particular state's law. That actor-client was instructed to pose some particular challenges, including occasional memory lapses, constant questioning, residual anger with the retirement community, demand for a

February 11, 2020

Page 2

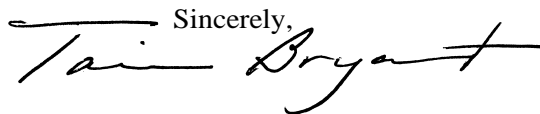
particular outcome (which would not be legally available, based on the facts), and inconsistent inclusion of her children in the initial interview and her decision-making process in the counseling interview. Charlotte successfully navigated all of these challenges in a calm, respectful, and helpful manner. She did not avoid delivering news that the client would not want to hear, and she was skillful in presenting different legal options to the client. She did seem a little uncomfortable during the first interview, but that had resolved by the second interview when she was presenting the results of legal research on the client's matter and the client's options.

The elder law class also included coverage of substantive elder law material. I recall quite clearly Charlotte's thoughtful completion of a demanding assignment through which students learn what it is like to go through the thought process necessary to draft an advance health care directive. She contributed regularly to class discussions of the different subjects, such as social security and private pension planning, housing and transportation challenges for seniors, elder abuse, and employment discrimination. She was well-liked by her classmates, which was helpful in a class that included so much simulation work.

It is no surprise to me that Charlotte is already performing exceptionally well in the UCLA Dog Administrative Hearings Clinic. She prepares seriously but does not take herself seriously. She has already made two valuable suggestions for the hearings, including a handout that non-native English speakers will find helpful when participating in the hearings. Charlotte will conduct her first hearing on February 21, 2020. I expect that she will do very well at adopting the more neutral position of a factfinder and decision-maker instead of the "zealous advocate" approach on which so many law school courses are premised.

During her three years of law school, Charlotte has grown considerably in confidence, but her starting point was already quite high. Besides being very smart and self-motivated, Charlotte is a remarkably mature and kind person. It has been a pleasure to work with her during each of her three years here at UCLA Law School.

In short, I have no reservations whatsoever about recommending Charlotte, and I hope you will give her application serious consideration.

Sincerely,

Taimie L. Bryant

Charlotte Leszinske Writing Sample

This writing sample is part of a brief which I wrote for a Moot Court competition. The problem was closed-universe and limited to the authorities cited herein. I represented three homeless persons, collectively Respondents, on appeal to the Supreme Court from a favorable circuit court judgment. The question presented was whether the Eighth Amendment forbade the fictional city of Anhedonia from criminalizing sleeping outside.

Introduction

Respondents, all homeless, were convicted of the crime of being unable to afford a place to rest. After Anhedonia passed a new, even stricter ordinance penalizing homeless people (Measure 66), Respondents filed suit to enjoin its enforcement. The Fifteenth Circuit found that Measure 66, which made it a crime to “sleep or reside anywhere other than a legal residence or government-provided temporary housing,” violated the Eighth Amendment’s prohibition on cruel and unusual punishments as applied to Respondents. This court should uphold that decision.

Statement of the Case

Respondents are homeless residents of Anhedonia who were arrested and jailed for sleeping outside. R at ER4. Of the Respondents, Respondent Kundera has been unemployed since 2012 and on the streets since 2015, Respondent Prague has been on the streets since 2013 and housing assistance waiting lists for multiple years, and Respondent Milan has only recently lost her public housing. R at E4. Anhedonia is a large metropolitan city which spans more than six hundred miles and suffers from high rents and insufficient public infrastructure. R at ER4.

Anhedonia is currently experiencing a homelessness crisis. Since 2014, Anhedonia’s homeless population has grown by thirty-five percent. R at ER4. Homeless persons in Anhedonia suffer from much higher crime and disease rates. R at ER5. According to UCLA sociologist Dr. Esterhazy, homelessness is caused by “a confluence of unpredictable and involuntary factors including sudden economic hardship, lack of sufficient governmental support, and physical and mental illnesses.” R at ER5. Although Anhedonia has spent billions of dollars on programs to alleviate homelessness, it is not apparent where these billions have gone: homeless Anhedonians outnumber available beds by a ratio of five to one. R at ER4-5.

Respondents were convicted of violating Measure 55, an ordinance (since repealed) which made it a crime for “any person to sleep or camp in public spaces, including parks, roads, highways, and street corners.” R at E4. Respondents now challenge Measure 66, a recently passed (and stricter) ordinance which makes it a crime to “sleep or reside anywhere other than a legal residence or government provided temporary housing.” R at ER4.

Respondents brought suit under 42 U.S.C. § 1983 against the City of Anhedonia to enjoin enforcement of Measure 66. R at ER5. On appeal, the Fifteenth Circuit overturned the district court’s judgment for the city. R at ER10. The Fifteenth Circuit found that Measure 66 violated the Eighth Amendment’s prohibition on cruel and unusual punishments. R at ER8. According to the Fifteenth Circuit, “enforcing Measure 66 when there are too few publicly available beds to house all of the city’s residents in need of housing” effectively criminalized Respondents’ status of homelessness. R at ER8. The city seeks to overturn this decision. R at ER2.

Argument

I. Because It Punishes Respondents for Being Homeless, Measure 66 Constitutes Cruel and Unusual Punishment and Is Unconstitutional as Applied to Respondents.

Neither party argues that Anhedonia can punish Respondents for simply being homeless. Where parties differ is whether Anhedonia can punish Respondents for incidental conduct which is integral to and an unavoidable result of being homeless. Respondents urge the Court to determine that punishing homeless persons for sleeping outside is punishing homelessness by another name.

A. The Eighth Amendment Prohibits the Government from Punishing “Status.”

The Eighth Amendment forbids “cruel and unusual punishments.” U.S. CONSTIT. AMEND. VIII. By “embod[ying] broad and idealistic concepts of dignity, civilized standards, humanity, and decency ... against which we must evaluate penal measures,” *Estelle v. Gamble*, 429 U.S. 97, 102 (1977) (internal citations omitted), the Eighth Amendment “impose[s] substantive limits on what can be made criminal and punished as such.” *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 279 (4th Cir. 2019), quoting *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). To determine the contours of these limits, courts look to “the evolving standards of decency that mark the progress of a maturing society.” *Miller v. Alabama*, 567 U.S. 460, 469 (2012).

In two landmark cases, the Supreme Court held that the Eighth Amendment forbids penalizing an individual’s “status,” such as illness, alcoholism, or narcotics addiction. *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *Powell v. Texas*, 392 U.S. 514, 534, 549 (1968). In

Robinson, the Court struck down a statute which made it a crime to “be addicted to the use of narcotics,” thus making “the ‘status’ of narcotic addiction a criminal offense.” *Robinson*, 370 U.S. at 660, 666. Recognizing that addiction is “an illness which may be contracted innocently or involuntarily,” the Court found that “at this moment in history ... a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment.” *Robinson*, 370 U.S. at 666.

In *Powell*, the Court clarified that *Robinson* forbade “pure status crimes,” such as “the mere status of being a narcotics addict.” *Powell*, 392 U.S. at 533 (plurality), 541-42 (Black, J., concurring). However, the justices disagreed whether *Robinson* also forbade criminalizing conduct which necessarily flowed from an individual’s status. The plurality held that such conduct could be criminalized – finding that *Robinson* required only that the accused “has committed some act” – and that an alcoholic could be punished for being drunk in public regardless of his status as an alcoholic. *Powell*, 392 U.S. at 533. But Justice White and four dissenting justices rejected the bright-line distinction between status and conduct. As Justice White put it, “[p]unishing an addict for using drugs convicts for addiction under a different name.” *Id.* at 548 (White, J., concurring). Justice White argued that incidental conduct which is integral to and an unavoidable result of an individual’s status – for example, a homeless alcoholic (status) who appears in public while intoxicated (unavoidable, incidental conduct) – cannot be punished. *Id.* at 551.

Powell was a plurality. In plurality opinions, the controlling position is that “taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. U.S.*, 430 U.S. 188, 193 (1977). As other courts have held, Justice White’s concurrence was the narrowest grounds supporting the *Powell* judgment. *See Manning*, 930 F. 3d at 281; *Martin v. City of Boise*, 920 F. 3d 584, 617 (9th Cir. 2019) (both adopting Justice White’s *Powell* concurrence under the *Marks* rule). Under Justice White’s concurrence, the Eighth Amendment forbids the government from criminalizing status, as well as “incidental conduct” both “integral to and an unavoidable result” of that status. *Jones v. City of Los Angeles*, 444 F. 3d 1118, 1136 (9th Cir. 2005); *accord*, *Manning*, 930 F. 3d at 283, 284; *Martin*, 920 F. 3d at 616-17. *See also Manning*, 930 F. 3d at 281-82 (considering and rejecting the argument that Justice White’s concurrence was “dicta”).

B. Because Sleeping in Public Is Incidental Conduct Both Integral to and an Unavoidable Result of Respondents' Status of Homelessness, Measure 66 Punishes Status.

Under *Powell*, Anhedonia cannot punish Respondents for their status of homelessness. Nor may Anhedonia punish conduct which is incidental, integral to, and the unavoidable consequence of homelessness. Because homelessness is a status, and sleeping in public is the unavoidable consequence of homelessness, Anhedonia may not punish it. But this is the precise effect of Measure 66 as applied to Respondents. Consequently, Measure 66 is unconstitutional under the Eighth Amendment.

i) Homelessness Is a Status.

“[P]eople rarely choose to be homeless.” *Pottinger v. City of Miami*, 810 F. Supp. 1151, 1563 (S.D. Fla. 1992). Though the Supreme Court has not defined “status,” “certain factors assist in its determination, such as the involuntariness of the acquisition of that quality ... and the degree to which an individual has control over that characteristic.” *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1166-67 (1995). The Court has held that suffering from a disease, alcoholism, and narcotics addiction are statuses. *Robinson*, 370 U.S. at 666; *Powell*, 392 U.S. at 548. In defining narcotics addiction as a status, Justice Douglas observed that addiction is caused by a “complex of forces,” making it difficult to control, and that “[t]he first step towards addiction may be as innocent as a boy’s puff on a cigarette.” *Robinson*, 370 U.S. at 670, 673 (Douglas, J., concurring).

Homelessness is a status. Writing just after Hurricane Andrew destroyed southern Florida, the *Pottinger* court found that “[a]n individual who loses his home as a result of economic hard times or physical or mental illness exercises no more control over these events than he would over a natural disaster.” *Pottinger*, 810 F. Supp. at 1564. People do not choose to be homeless: homelessness results from the interplay of many factors, including “mental illness, substance abuse, domestic violence, low-paying jobs, and, most significantly, the chronic lack of affordable housing.” *Jones*, 444 F. 3d at 1123. In *Jones*, the majority noted that average rent for “affordable” housing in Los Angeles was almost double the monthly public housing stipend, and

waitlists for housing assistance vouchers were three to ten years long. *Id.* at 1122. Like narcotics addiction, the first step to homelessness may be as innocent as a late rent payment, and the complex of forces which make for homelessness make it just as hard to cure. See *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994) (“[A]t any given time there are persons in Dallas who have no place to go, who could not find shelter even if they wanted to—and many of them do want to—and who would be turned away from shelters for a variety of reasons”).

The facts of this case compel this conclusion. None of the Respondents “chose” to be homeless. Respondents Prague and Milan became homeless after failing to obtain or losing public housing. R at ER4; see *Jones*, 444 F. 3d at 1122. Respondent Kundera became homeless after three years of unemployment. R at ER4. Despite spending billions of dollars to mitigate its homelessness crisis, Anhedonia’s homeless population has grown by thirty-five percent since 2014. R at ER4. Moreover, UCLA sociologist Dr. Esterhazy testified that homelessness results from a confluence of factors, including “sudden economic hardship, lack of governmental support, and physical and mental illness,” rather than personal choice. R at ER5. Because homelessness is both involuntary and difficult to control, homelessness is a status which under *Robinson* and *Powell* cannot be punished. *Tobe*, 9 Cal. 4th at 1166-67.

ii) Sleeping in Public Is Incidental Conduct Both Integral to and an Involuntary Result of the Status of Homelessness; Consequently, the City Cannot Punish It.

Lacking a private space to sleep is the primary characteristic of being homeless. If a homeless person cannot secure a bed at a shelter, that person has no choice but to sleep outside. Thus where indoor shelter is unavailable, sleeping in public is incidental conduct which is integral to and the unavoidable consequence of being homeless. *Jones*, 444 F. 3d at 1137.

In Anhedonia, homeless persons outnumber available shelter beds by a factor of 5 to 1. R at ER5. While some homeless may find temporary housing with relatives or in a hotel, most cannot rely on private support. As a result, every night, some homeless Anhedonians must sleep in public. This unavoidable conclusion evades the city, which urges this Court that sleeping in public is nevertheless a voluntary act. R at ER5. But for homeless persons, “the conduct at issue here is involuntary and inseparable from status—they are one and the same, given that human

beings are biologically compelled to rest, whether by sitting, lying, or sleeping.” *Jones*, 444 F. 3d at 1136. So long as there are insufficient beds to house Anhedonia’s homeless population, some are biologically compelled to rest in public. *Id.* In such cases, “by criminalizing sitting, lying, and sleeping, the City is in fact criminalizing [Respondents]’ status as homeless individuals.” *Id.* at 1137.

Anhedonia argues that city shelters are rarely full, and that Respondents could have avoided punishment by sleeping at one of these shelters. R at ER5. Even if beds were available, Anhedonia’s shelters are spread over 600 miles, an impossible distance to cover for a night’s rest. R at ER4, ER5. See *Jones*, 444 F. 3d at 1140 (noting that plaintiffs were cited for sleeping on the street after they missed the bus to the shelter); R at ER4 (“Anhedonia suffers from a significant lack of public infrastructure”). And shelters are not available to all people: for example, in *Jones*, a husband and his disabled wife (who he cared for) could not stay at a shelter because the shelter would separate them by gender. *Id.* at 1125. Though Anhedonia’s lack of sufficient beds would itself make Measure 66 unconstitutional, the difficulty of accessing beds which may be available only bolsters that conclusion.

All people must sleep, and in Anhedonia, at least some must sleep outside. Because it criminalizes conduct integral to and the unavoidable consequence of homelessness, Measure 66 constitutes cruel and unusual punishment and is unconstitutional under the Eighth Amendment. *Miller*, 132 S. Ct. at 2463.

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 Date of BA/BS **May 2008**
 JD/LLB From **Vanderbilt University Law School**
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Date of JD/LLB **May 15, 2016**
 Class Rank **School does not rank**
 Does the law school have a Law Review/Journal? **Yes**
 Law Review/Journal **No**
 Moot Court Experience **No**

Bar Admission

Admission(s) **Tennessee**

Prior Judicial Experience

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Specialized Work Experience	Appellate, Bankruptcy, Patent, Pro Se
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**This applicant has certified that all data entered in this profile and
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